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IN THE

Supreme Court of the United States

DAVID C. WITTIG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the Court left unresolved in *Kimbrough* v. *United States*, appellate courts should engage in "closer review . . . when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect §3553(a) considerations even in a mine-run case." __ U.S. __, 128 S.Ct. 558, 575 (2007) (internal quotation marks omitted).

2. Whether the directive in 18 U.S.C. §3553(a)(6) for district courts to avoid unwarranted sentencing disparities is applicable to codefendants within the same case or confined to disparities between similarly situated defendants nationwide.

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceedings below are named in the caption of this petition for writ of certiorari.

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PETITION FOR WRIT OF CERTIORARI

The Court should grant the petition to resolve two important and unsettled questions regarding the reasonable limits of district courts' sentencing discretion following *Gall* v. *United States*, __ U.S. __, 128 S.Ct. 586 (2007), and *Kimbrough* v. *United States*, __ U.S. __, 128 S.Ct. 558 (2007). First, the courts of appeals have adopted conflicting approaches regarding the permissible scope of review when district courts impose anomalously high or low sentences based on idiosyncratic sentencing views. This conflict brings to the forefront the question left open in *Kimbrough*: whether "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect §3553(a)

considerations even in a mine-run case." 128 S.Ct., at 575 (internal quotation marks omitted). In the wake of *Kimbrough* and *Gall*, the Tenth Circuit has dramatically curtailed the scope of its substantive-reasonableness review, affirming sentences well outside the Guidelines range as long as "the sentencing judge provides reasons for the length of the sentence." App. 17a (Hartz, J., concurring). Although the Ninth Circuit, too, essentially treats substantive appellate review of variances as a "rubber stamp," *United States* v. *Ruff*, 535 F.3d 999, 1005 (CA9 2008) (Gould, J., dissenting), other circuits have recognized their enduring authority to meaningfully assess a sentence's substantive reasonableness, carefully scrutinizing district courts' rationales for varying from the Guidelines, particularly in mine-run cases. See, *e.g.*, *United States* v. *Ofray-Campos*, 534 F.3d 1, 42-44 (CA1), cert. denied, 77 U.S.L.W. 3281 (U.S. Nov. 10, 2008) (No. 08-6771); *United States* v. *Levinson*, 543 F.3d 190, 199-202 (CA3 2008); *United States* v. *Funk*, 534 F.3d 522, 528-530 (CA6 2008).

Mr. Wittig's case illustrates how, under the Tenth Circuit's perfunctory approach, that court "may go through the motions of substantive-reasonableness review, but it will be an empty gesture." App. 17a (Hartz, J., concurring). Following two prior, pre-*Gall*-and-*Kimbrough* reversals of Mr. Wittig's sentence, the Tenth Circuit reluctantly affirmed the district court's third sentence, 24 months, which quadrupled the maximum sentence allowed under Mr. Wittig's 0-6 month Guidelines range. App. 8a, 16a. However, in a concurring opinion joined by every member of the appellate panel—all three of whom later voted to rehear their own decision en banc—the judges disputed the Tenth Circuit's

constrained approach to substantive-reasonableness review under 18 U.S.C. §3553(a). App. 17a-18a (Hartz, J., concurring). They contended that the §3553(a) factors that require consideration of the Guidelines and the need to avoid unwarranted sentencing disparities "have real teeth, and should be a matter of concern to appellate courts that wish to effectuate congressional intent that we be a nation of equal justice under law, in which the length of time that a defendant is deprived of liberty does not depend primarily and significantly on who the sentencing judge happens to be." App. 17a-18a (Hartz, J., concurring) (citing 18 U.S.C. §3553(a)(4), (6)).

The Court should grant the petition to resolve disagreement and confusion amongst the courts of appeals over the proper scope of appellate review in mine-run cases, like Mr. Wittig's, when the only reason the length of a sentence exceeds the Guidelines range "is that the sentencing judge has an idiosyncratic view of the seriousness of the offense, the significance of the defendant's criminal history and personal qualities, or the role of incarceration in the criminal justice system." App. 18a (Hartz, J., concurring).

Second, the Court should grant the petition to resolve a conflict amongst the courts of appeals over the propriety of considering sentencing disparities between codefendants under 18 U.S.C. §3553(a)(6). See *United States* v. *Wills*, 476 F.3d 103, 109, n.5 (CA2 2007) (noting that "circuit courts have taken diverse positions on whether the phrase 'unwarranted sentence disparities' in §3553(a)(6) permits consideration of co-defendants' sentences"). Following *Gall*, the Tenth Circuit retreated from its previous decisions construing §3553(a)(6) as a

directive to avoid sentencing disparities nationwide, rather than between codefendants within the same case. Compare App. 9a-10a (citing *United States* v. *Smart*, 518 F.3d 800, 804 (CA10 2008)), with, *e.g.*, *United States* v. *Gallegos*, 129 F.3d 1140, 1143 (CA10 1997). The Tenth Circuit's erroneous post-*Gall* interpretation of 18 U.S.C. §3553(a)(6), which is followed to varying degrees by the majority of circuits, conflicts with better-reasoned analyses of the Seventh and Eleventh Circuits. See *United States* v. *Omole*, 523 F.3d 691, 700 (CA7 2008) (reaffirming post-*Gall* that the court "will only disturb a sentence based on an unjustifiable disparity between co-defendants . . . if it actually creates a disparity between the length of the appellant defendant's sentence and all other similar sentences imposed *nationwide*" (internal quotation marks omitted)); *United States* v. *Vidal*, No. 07-14717, 2008 WL 1875965, at *4 (CA11 Apr. 29, 2008) (unpublished) (explaining post-*Gall* that adjusting disparities between codefendants would "creat[e] disparities between the sentences given the defendants in the case under review and those given similarly situated defendants in other cases"). The Court should resolve the conflict over 18 U.S.C. §3553(a)(6) by granting the petition and reversing the Tenth Circuit's judgment.

CITATION OF OPINIONS AND ORDERS

The Tenth Circuit's opinion, App. 1a, is reported at *United States* v. *Wittig*, 528 F.3d 1280 (CA10 2008).[1]

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[1] The Tenth Circuit issued two prior opinions regarding Mr. Wittig's sentence. The first, App. 67a, is reported at *United States* v. *Weidner*, 437 F.3d 1023 (CA10 2006). The second, App. 71a, is not published in the Federal Reporter but is available

The Tenth Circuit's order denying Mr. Wittig's petition for rehearing en banc, App. 138a, is unreported.

The district court's memorandum and order, App. 19a, is published at *United States* v. *Wittig*, 474 F.Supp.2d 1215 (D. Kan. 2007).

JURISDICTION

The Tenth Circuit entered judgment on June 17, 2008, see App. 1a, and, on September 16, 2008, voted 6-5 to deny Mr. Wittig's timely petition for rehearing en banc. App. 138a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

A district court's sentencing discretion is guided by the factors set forth in 18 U.S.C. §3553(a), which are quoted in the appendix. App. 140a-142a.

STATEMENT OF THE CASE

David Wittig was a successful investment banker in New York when Westar Energy, Inc., the largest publicly held company in Kansas, recruited him back to his home state, where he ultimately served as the utility's CEO. App. 89a. Westar initially thrived under Mr. Wittig's leadership but later encountered financial difficulties, and he ultimately resigned.

Mr. Wittig then found himself at the center of two highly publicized federal prosecutions in the District of Kansas. See 18 U.S.C. §3231. One alleged fraudulent failures to report compensation—primarily use of the company plane—in Westar's disclosures to the Securities and Exchange

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electronically at *United States* v. *Wittig*, No. 06-3166, 2006 WL 3378451 (CA10 Nov. 22, 2006).

Commission and in internal documents. See App. 4a, n.4. The other, the case now before this Court, alleged bank fraud stemming from Mr. Wittig's use of his line of credit at a local bank to make a personal loan of $1.5 million to the bank president, which the bank president did not disclose, as required by federal regulations. App. 73a-74a.

In the Westar prosecution, Mr. Wittig's first trial ended in a hung jury. App. 4a, n.4. After the second trial, the Tenth Circuit reversed all counts of conviction, holding that the district court erroneously refused to instruct the jury on SEC income-reporting requirements and that double jeopardy barred retrial on most of the counts. *United States* v. *Lake*, 472 F.3d 1247, 1262-1263, 1267 (CA10 2007). The Tenth Circuit currently is considering an interlocutory appeal by Mr. Wittig that challenges the broad scope of the third Westar trial that the district judge authorized despite the Tenth Circuit's prior decision and its double-jeopardy holding.[2]

The presiding judge in the Westar case also presided over Mr. Wittig's prosecution for a personal loan to a bank president. No disclosure requirements existed for Mr. Wittig regarding that personal loan; and the extension of Mr. Wittig's line of credit that funded the loan was fully collateralized and fully repaid, with no loss to the bank. App. 82a, 132a-133a. Nonetheless, Mr. Wittig was convicted of bank fraud, along with the bank president, based on the president's failure to disclose receipt of the funds on a bank-officer questionnaire. App. 103a. Mr. Wittig originally was sentenced in 2004, when application of

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[2] See *United States* v. *Wittig*, No. 08-3220 in the United States Court of Appeals for the Tenth Circuit.

the Guidelines was mandatory. Although the Guidelines range for Mr. Wittig's base-offense level was 0-6 months, App. 81a, the district court imposed a sentence of 51 months, App. 88a, applying enhancements for intended loss and gross receipts exceeding $1 million. App. 128a; U.S.S.G. §2B1.1(b)(1)(I); *id.* §2B1.1(b)(12)(A).

In Mr. Wittig's first appeal, the Tenth Circuit affirmed the conviction but noted that "the sufficiency of the evidence against Mr. Wittig presents a close issue." App. 103a. As to the 51-month sentence, however, the Tenth Circuit reversed, holding that the district court erred by including intended-loss and gross-receipts enhancements when Mr. Wittig's loan to the bank president came from an extension of his line of credit that was fully collateralized and on which the bank suffered no loss. See, *e.g.*, App. 132a-134a. Because *United States* v. *Booker*, 543 U.S. 220 (2005), was decided while Mr. Wittig's appeal was pending, the court remanded for resentencing under 18 U.S.C. §3553. App. 134a.

On remand, the district court imposed the same intended-loss and gross-receipts enhancements that had been rejected by the Tenth Circuit and *increased* Mr. Wittig's sentence from 51 to 60 months. App. 77a-79a. Citing Mr. Wittig's separate (but now reversed) conviction in the Westar case, the district court suggested that the Westar conviction justified a higher sentence in the bank case. App. 78a.

The Tenth Circuit again vacated the sentence, holding that the correct Guidelines range is 0-6 months and that the district court had "disregarded" its prior holding and "impermissibly reapplied a gross-receipts enhancement to determine [Mr. Wittig's] offense level." App. 81a. The court also

emphasized that there was no evidence of intended loss, not only foreclosing a Guidelines enhancement, but also expressly prohibiting any consideration of loss under 18 U.S.C. §3553(a). App. 85a. Finally, the court held that any connection between this case and the Westar case was "too tenuous to justify a variance from a Guidelines sentence." App. 85a.

In its third sentencing proceeding, the district court again relied on the foreclosed intended-loss enhancement—this time as a so-called "guidepost." App. 60a. It also cited what it claimed were "dramatic" facts to justify a variance that quadrupled the upper limit of Mr. Wittig's Guidelines range. App. 56a. The district court focused on Mr. Wittig's role as a bank customer in a "nominee loan" that benefited the bank president, but it did not identify particular circumstances regarding Mr. Wittig or the offense that were not already accounted for by the Guidelines. See App. 57a-60a. Additionally, although the district court acknowledged the far more culpable role of Mr. Wittig's codefendant—who had abused a position of trust as a bank president and had obstructed justice, App. 57a-60a, 63a—the district court nonetheless attempted to narrow the disparity between the bank president's 60-month sentence and Mr. Wittig's Guidelines range of 0-6 months. App. 61a-63a.

Beyond the sentence, the district court sought to judicially micromanage Mr. Wittig's career through a condition of supervised release that required court approval before Mr. Wittig could exercise "executive authority over a business, company or agency" or engage in any "financial agreements or negotiations on behalf of any business, company or agency." App. 36a-38a. In its most recent opinion, the Tenth

Circuit vacated the restriction, concluding that the district court's "terse[ ]" and "conclusory" explanation could not support the sweeping employment restraint. App. 12a-16a.

Regarding the upward variance that quadrupled Mr. Wittig's maximum Guidelines sentence, however, the Tenth Circuit affirmed. Although the court questioned whether, as the district court had claimed, "the facts are indeed 'dramatic,'" App. 10a, it observed that its review was governed by the circuit's substantive-reasonableness precedent following *Gall* and *Kimbrough*, App. 10a-11a, which were decided while Mr. Wittig's appeal was pending. Under that standard, the court could not overturn the sentence or disagree with the district court's blanket statement that an upward variance "'is necessary to afford adequate deterrence to bank customers who are aiders and abettors to nominee loans with bank officers.'" App. 11a (quoting App. 64a-65a). The court also cited the circuit's post-*Gall* precedent that foreclosed error based on the district court's reliance on codefendant disparities. App. 9a-10a.

Accompanying the affirmance of the sentence, however, was a unanimous concurrence written by Judge Hartz and joined by the two other panel members, Judges O'Brien and Holmes. Invoking "congressional intent that we be a nation of equal justice under law," the concurrence disputed the Tenth Circuit's constrained approach to substantive-reasonableness review, characterizing it as an "empty gesture" that precludes reversal even when a sentence is driven by a particular judge's "idiosyncratic views." App. 17a-18a (Hartz, J., concurring). Citing 18 U.S.C. §3553(a)(4) and (6), in particular, the concurrence reasoned that these two

factors "have real teeth, and should be a matter of concern to appellate courts," so that "the length of time that a defendant is deprived of liberty does not depend primarily and significantly on who the sentencing judge happens to be." App. 17a-18a (Hartz, J., concurring).

When Mr. Wittig timely filed a petition for rehearing en banc, all three members of the panel voted for the full court to rehear their own decision. App. 138a. But, by a sharply divided 6-5 vote, with one judge recused and Judges McConnell and Tymkovich aligned with the three panel members in favoring en banc consideration, the Tenth Circuit denied Mr. Wittig's petition. App. 138a.

Prior to being released on bond in February 2007, Mr. Wittig served more than 12 months in prison on a sentence for which the Guidelines maximum is 6 months. Mr. Wittig is now scheduled to report back to prison on January 7, 2009, for the remainder of the 24-month sentence.[3] Had the district court correctly calculated Mr. Wittig's Guidelines sentence from the outset in 2004, when the Guidelines were still mandatory, Mr. Wittig's sentence, as a matter of law, could not have exceeded 6 months.

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[3] On November 25, 2008, the district court denied Mr. Wittig's motion to stay his reporting date pending this Court's resolution of his petition for writ of certiorari, concluding that it lacked jurisdiction to issue a stay under 28 U.S.C. §2101. *United States* v. *Wittig*, No. 02-40140-02-JAR, Memorandum and Order (D. Kan. Nov. 25, 2008). On December 11, 2008, Mr. Wittig filed a motion alternatively requesting that the district court continue his release on bail pending a ruling on his petition for writ of certiorari. See 18 U.S.C. §3141(b).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve disagreement and confusion amongst the courts of appeals regarding the permissible scope of reasonableness review when an anomalous sentence is imposed in a mine-run case based on the district court's idiosyncratic views. The Tenth Circuit's decision demonstrates how some circuits' restrictive interpretations of *Gall* and *Kimbrough* confer unbridled sentencing authority on district courts, leaving appellate judges powerless to reverse a "significant variance" from the Guidelines that "can be justified only by disagreement with the general views of other judges." App. 18a (Hartz, J., concurring). As the unanimous concurrence observed, "[u]nder this court's present approach we may go through the motions of substantive-reasonableness review, but it will be an empty gesture." App. 17a (Hartz, J., concurring).

While the Ninth Circuit, like the Tenth, now treats substantive-reasonableness review as a "rubber stamp" exercise, *Ruff*, 535 F.3d, at 1005 (Gould, J., dissenting), the First, Third, and Sixth Circuits continue to meaningfully assess the reasonableness of anomalous sentences, demanding that Guidelines deviations rest on factors unique to the defendant or offense rather than on personal disagreement with Guidelines policies. See, *e.g.*, *United States v. Ofray-Campos*, 534 F.3d 1, 42-44 (CA1), cert. denied, 77 U.S.L.W. 3281 (U.S. Nov. 10, 2008) (No. 08-6771); *United States* v. *Levinson*, 543 F.3d 190, 199-202 (CA3 2008); *United States* v. *Funk*, 534 F.3d 522, 528-530 (CA6 2008). Under the courts of appeals' divergent approaches, sentences vary dramatically depending not only on the personal sentencing views

of the judge to whom the case is assigned, but also on the circuit to which the sentence is appealed, inviting nationwide disparities that thwart fundamental "congressional intent that we be a nation of equal justice under law." App. 18a (Hartz, J., concurring).

Nationwide disparities also will result from the courts of appeals' disagreement as to the proper construction of 18 U.S.C. §3553(a)(6) and the propriety of comparing the sentences of defendants within the same case, as opposed to nationwide. The Tenth Circuit's post-*Gall* misinterpretation of §3553(a)(6), which the majority of circuits endorse to varying degrees, contravenes the statute's plain meaning, contradicts its legislative history, and conflicts with the Seventh and Eleventh Circuits' proper refusals to interpret §3553(a)(6) as a license to vary from the Guidelines based solely on a codefendant's sentence. Indeed, even within circuits aligned with the Tenth, courts have recognized that codefendant considerations under §3553(a)(6) exalt a "microcosmic approach to sentencing disparities" that "create[s] its own set of disparities with other similarly situated defendants," *United States* v. *Cisneros-Gutierrez*, 517 F.3d 751, 767 (CA5 2008), contravening the statute's goal of promoting "aggregate" sentencing uniformity "on a *national* level." *United States* v. *Fernandez*, 443 F.3d 19, 31, n.9 (CA2 2006); *United States* v. *Smith*, 510 F.3d 603, 610 (CA6 2007), cert. denied, 128 S.Ct. 1910 (2008).

Both the permissible scope of substantive-reasonableness review and the proper construction of §3553(a)(6) following *Gall* and *Kimbrough* are important and unsettled federal questions that warrant the Court's immediate attention. The Court should grant the petition, resolve the conflicts

amongst the courts of appeals on these issues, and reverse the Tenth Circuit's judgment.

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE PERMISSIBLE SCOPE OF APPELLATE REVIEW WHEN A DISTRICT COURT REJECTS GUIDELINES POLICY BASED ON IDIOSYNCRATIC SENTENCING VIEWS.

While noting, in *Kimbrough*, that "closer review may be in order" when judges vary from the Guidelines based solely on their "view that the Guidelines range fails properly to reflect §3553(a) considerations even in a mine-run case," the Court also observed that *Kimbrough* "present[ed] no occasion" to resolve that issue. 128 S.Ct., at 575 (internal quotation marks omitted). Lacking guidance on this important and unsettled question, appellate courts have developed widely divergent and conflicting views over the level of discretion afforded district courts in such cases and on the permissible scope of their own appellate review.

The Tenth Circuit falls at one end of the spectrum, having adopted an unwarranted interpretation of *Gall* and *Kimbrough* that renders substantive-reasonableness review an "empty gesture," even in mine-run cases. App. 17a (Hartz, J., concurring). Sentences far outside the Guidelines range are affirmed regardless whether a district court "distinguish[es] [the defendant's] characteristics and history from those of the ordinary . . . offender contemplated by the Guidelines" or relies on factors the Guidelines already take into account. *Smart*, 518 F.3d, at 808-810 (alterations in original) (internal quotation marks omitted); *id.*, at 816 (Hartz, J., dissenting) (objecting to majority's affirmance of downward variance when "the district court did

not point to anything special about this case" to justify disagreement with "national norms" encapsulated in the Guidelines); see also App. 17a-18a (Hartz, J., concurring) (observing that the circuit's approach precludes reversal of variances even when based solely on a sentencing judge's "idiosyncratic . . . disagreement with the general views of other judges," as reflected in the Guidelines).[4]

Mr. Wittig's case offers a prime example. Mr. Wittig was convicted of being a bank customer who obtained a "nominee loan," the proceeds of which Mr. Wittig in turn lent to a bank officer. App. 103a. Mr. Wittig's loan to the bank officer was perfectly legal. App. 103a. The bank officer's nondisclosure of the loan was not. App. 103a-104a. This run-of-the-mine offense lacked anomalously egregious facts to separate it from the heartland of bank-fraud convictions and was atypical, if at all, for the opposite reason: the bank's extension of Mr. Wittig's line of credit was fully collateralized, the bank's assets were never at risk, and Mr. Wittig was found to have never intended nor caused any loss to the bank. App. 44a-46a, 82a, 132a-133a. Indeed, it was a "close issue" on appeal as to whether there was even sufficient evidence to sustain the conviction. App. 103a.

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[4] In *Smart*, the Tenth Circuit acknowledged *Kimbrough*'s recognition that "closer review" may be warranted when a district court rejects the Guidelines calculation in a mine-run case, 518 F.3d, at 807; but, in practice, as the unanimous concurrence observed in Mr. Wittig's case, no "closer review" exists in the Tenth Circuit, where the substantive-reasonableness standard does not permit appellate reversals of sentences that deviate from the Guidelines based on a judge's idiosyncratic sentencing views, even in a mine-run case. App. 17a-18a (Hartz, J., concurring).

Yet, the district court varied substantially upward from the Guidelines for this first-time offender based on factors either inherent in any bank-fraud offense or otherwise common to the vast majority of similarly situated defendants. App. 8a (citing district court's observations that Mr. Wittig "was involved in a fraudulent scheme involving a financial institution" and that he "intended to profit (and did profit) from the fraud"). Although the district court also noted the amount of money involved—$1.5 million—it failed to justify why the amount of funds warranted an increased sentence, given that none of the money was ever at risk, no loss was intended or caused, and the very Guideline the district court invoked for its variance requires loss to increase a sentence. App. 59a-60a (citing the "loss table for fraud"); see also App. 44a-46a, 82a, 85a, 133a-134a.

Instead, in support of its anomalously high sentence, the district court offered its personal view that upward variances are "'necessary to afford adequate deterrence to bank customers who are aiders and abettors to nominee loans with bank officers.'" App. 11a (quoting App. 64a-65a). The statement was not tied to the particular facts of *this* case or *this* defendant, but was uttered as a categorical rule, which contradicts the individualized sentencing principles on which *Gall* and *Kimbrough* rest. See *Gall*, 128 S.Ct., at 599-602 (noting the "unique facts" that distinguished the defendant "from the vast majority" of similarly situated offenders); *Kimbrough*, 128 S.Ct., at 575-576 (emphasizing that the sentencing judge "properly homed in on the particular circumstances" of the case and on the Commission's criticism of the particular guideline at issue). Nor did the district court explain why an advisory Guidelines sentence of up to 6 months would

not adequately deter bank *customers*, as opposed to other bank-fraud offenders. See App. 64a-65a. Nonetheless, under the Tenth Circuit's perfunctory substantive-reasonableness review, see App. 17a-18a (Hartz, J., concurring), the panel had to accept this rationale and the district court's idiosyncratic view of the offense. App. 10a-11a.

The panel members did, however, unanimously advocate, in concurrence, a "different approach" that more faithfully complies with this Court's individualized sentencing focus in *Gall* and *Kimbrough*, explaining why "a significant variance" from the "general views of other judges," as studied by the Sentencing Commission and as reflected in the Guidelines, "should be considered unreasonable." App. 17a-18a (Hartz, J., concurring). The concurrence's approach makes sense: When judges reject the Guidelines range without providing any real distinctions between the defendant and other similarly situated offenders, the resulting sentence rests on the judge's personal view that the Guidelines fail properly to reflect §3553(a) considerations, even in a mine-run case. Such sentences should not should be assumed substantively reasonable on appeal, and review should not consist of perfunctorily assessing only whether "the sentencing judge provides reasons for the length of the sentence." App. 17a (Hartz, J., concurring). Instead, "disagreement with one of the Commission's core policies at least requires an explanation beyond a mere assertion of a contrary point of view." *Smart*, 518 F.3d, at 816 (Hartz, J., dissenting).

Like the Tenth Circuit, the Ninth Circuit has eviscerated substantive-reasonableness review, essentially equating the post-*Gall*-and-*Kimbrough*

abuse-of-discretion standard with "a rubber-stamp of all sentencing decisions made by a district court." *Ruff*, 535 F.3d, at 1005 (Gould, J., dissenting) (criticizing majority's affirmance of variance resulting in one-day prison sentence for extensive embezzlement from medical center); see also, *e.g.*, *United States* v. *Whitehead*, 532 F.3d 991, 997, 999 (CA9 2008) (*per curiam*) (Bybee, J., dissenting in part) (criticizing majority's affirmance of probation for offender "convicted of stealing over $1 million in profits from DirecTV . . . . based on factors that were both unexceptional and *already* reflected in the district court's tentative Guidelines calculation").

Although the Ninth Circuit roots its hands-off sentencing review in *Gall* and *Kimbrough*, "[n]othing in *Booker*, *Rita*, *Gall*, or [the circuit's] own assimilation of these cases . . . suggests that the Supreme Court has taken the courts of appeals out of the business of reviewing sentences." *Whitehead*, 523 F.3d, at 995 (Bybee, J., dissenting in part). "On the contrary, in each of these cases the Court has explicitly held that the appellate courts *must* continue to play an important role in the process of ensuring that criminals are punished fairly." *Ibid.* "[S]ubstantive review of sentences may be limited after *Gall*, but being deferential does not mean turning a blind eye to an injustice." *Id.*, at 994.

Unlike the Ninth and Tenth Circuits, the First, Third, and Sixth Circuits remain actively engaged in "the business of reviewing sentences," *id.*, at 995, correctly recognizing that *Gall* and *Kimbrough* do not preclude meaningful appellate assessment of district courts' variance rationales. See, *e.g.*, *United States* v. *Martin*, 520 F.3d 87, 95 (CA1 2008) (emphasizing that "what matters most is that the sentencing court

made plain just how this defendant stood out from the mine-run of criminal defendants"); see also *United States* v. *Ofray-Campos*, 534 F.3d 1, 43 (CA1), cert. denied, 77 U.S.L.W. 3281 (U.S. Nov. 10, 2008) (No. 08-6771) (reiterating that, before relying on factors already contemplated by the Guidelines, judges must articulate how the defendant or offense differs from the norm); *United States* v. *Levinson*, 543 F.3d 190, 201 (CA3 2008) ("[I]f a district court wants to vary from the Guidelines for a reason that is contrary to the Commission's stated position, it must explain why the general policy should not apply in the particular case before it."); *United States* v. *Funk*, 534 F.3d 522, 529-530 (CA6 2008) (applying a less-deferential standard of review to sentences that vary from the Guidelines in mine-run cases and requiring districts courts to articulate facts or circumstances unique to the offender or offense).

These circuits continue to reverse sentences that vary from the Guidelines when the district court fails to identify characteristics that remove the conviction from the heartland of offenses or that justify rejection of Guidelines policy in a particular case. See, *e.g.*, *Ofray-Campos*, 534 F.3d, at 43 (reversing upward variance based on factors that "had already been considered, and accounted for" by the Guidelines); *Levinson*, 543 F.3d, at 201 (reversing downward variance when district court failed to explain why punishment categorically should be less severe for certain types of fraud); *Funk*, 534 F.3d, at 530 (reversing downward variance when "the sentencing court did not justify th[e] variance with any fact or

circumstance unique to this defendant (such as in *Gall*) or to this crime (such as in *Kimbrough*)").[5]

The Sixth Circuit, in particular, has analyzed how the "closer review" contemplated by *Gall* in mine-run cases effectuates this Court's recent sentencing jurisprudence. Building on *Rita* v. *United States*, the Sixth Circuit has observed that, in every case, "both the sentencing judge and the Sentencing Commission will have reached [a] conclusion as to the proper sentence in [that] particular case," with both "carrying out the same basic §3553(a) objectives." *Funk*, 534 F.3d, at 528 (quoting 551 U.S. ___, 127 S.Ct. 2456, 2463 (2007)) (alterations in original). Because "the same basic objectives" inform both the Guidelines calculation and the district court's discretionary determination, a divergence between the two regarding the proper sentence in a mine-run case warrants careful appellate consideration:

> "Thus, we find that 'closer review,' from this perspective, means that when the sentencing judge disagrees with the Commission's determinations in these 'mine run cases'—which, by definition, fall squarely within the Commission's province of expertise, i.e., within 'the 'heartland' to which the Commission intends individual Guidelines to apply,' [127 S.Ct.,] at

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[5] Although the Seventh Circuit has not articulated as consistent a standard for reviewing variance rationales as have the First, Third, and Sixth Circuits, it has observed that "[a] variant sentence based on factors that are particularized to the individual defendant may be found reasonable, but we are wary of divergent sentences based on characteristics that are common to similarly situated offenders." *Omole*, 523 F.3d, at 698-700 (reversing downward variance that lacked particularized support).

> 2463 (citing U.S.S.G. §5K2.0)—a reviewing court can look with a little more skepticism at a sentencing judge's individualistic determination and with a little more favor towards the Commission's advisory-Guidelines." *Id.*, at 528-529.

Accordingly, because a "sentencing judge's decision [is] contrary to the Commission's established Guidelines in a case perfectly suited to the Commission's determination, and hence, the Guidelines," the district court's variance in a mine-run case, when reviewed on appeal, "does not receive as much deference as it would in an unusual case, when the Guidelines calculations do not fit the circumstances quite so neatly." *Id.*, at 529.[6] The Sixth Circuit's thoughtful analysis of "closer review" in mine-run cases exposes the inadequacy of the Tenth Circuit's contrary practice, under which sentences driven by idiosyncratic views pass muster as substantively reasonable, App. 18a (Hartz, J., concurring), and the "standard of review does not change 'even if the facts of the case are less than extraordinary.'" App. 11a (quoting *Smart*, 518 F.3d, at 808).

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[6] When "a district court implements a policy decision applicable to a wide class of offenders that is at odds with the Sentencing Commission," engaging in "closer review" on appeal safeguards against "regression of the sentencing process to the greatest deficiencies of the pre-Guidelines regime, namely, its failure . . . to ensure that the sentencing judge's exercise of discretion was informed by authoritative criteria and principles." *United States* v. *Cavera*, __F.3d__, No. 05-4591, 2008 WL 5102341, at *29 (CA2 Dec. 4, 2008) (Sotomayor, J., concurring in part and dissenting in part) (protesting the en banc majority's failure to examine the "closer review" contemplated by *Kimbrough* (internal quotation marks omitted)).

As a result of the courts of appeals' divergent approaches to substantive-reasonableness analysis, variances based on idiosyncratic sentencing views will receive meaningful scrutiny in some circuits but perfunctory affirmances in others, where "[t]he reality is that a defendant's ultimate sentence now depends substantially on the personal sentencing philosophy of his or her sentencing judge." *United States* v. *Shy*, 538 F.3d 933, 938-940 (CA8 2008) (Colloton, J., concurring). The Court should grant the petition, reverse the Tenth Circuit's judgment, and hold, as the unanimous concurrence recognized in Mr. Wittig's case, that the §3553(a) factors requiring consideration of the Guidelines range and the need to avoid nationwide disparities have "real teeth" and must be meaningfully assessed to ensure that appellate courts "effectuate congressional intent that we be a nation of equal justice under law." App. 17a-18a (Hartz, J., concurring).

II. THE TENTH CIRCUIT'S ERRONEOUS APPROACH TO CODEFENDANT DISPARITY UNDER §3553(a)(6) CONFLICTS WITH OTHER CIRCUITS' BETTER-REASONED DECISIONS AND UNDERMINES THE IMPORTANT FEDERAL GOAL OF NATIONWIDE CONSISTENCY IN SENTENCING.

In approving the district court's quadrupling of Mr. Wittig's sentence to narrow the disparity between Mr. Wittig and his codefendant, the Tenth Circuit disavowed its prior holding that "the purpose of the guidelines is to 'eliminate unwarranted disparities in sentencing nationwide . . . not to eliminate disparity between co-defendants.'" *Gallegos*, 129 F.3d, at 1143 (quoting *United States* v. *Garza*, 1 F.3d 1098, 1100 (CA10 1993)). Explaining this reversal of a long-standing interpretation, the Tenth Circuit asserted

that "codefendant disparity is not a per se 'improper factor' post-*Gall*," App. 10a (quoting *Smart*, 518 F.3d, at 804), transforming this Court's statement that a district court may consider "the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated," *Gall*, 128 S.Ct., at 600, into an authorization to ignore warranted *dissimilarities* between Mr. Wittig and his more culpable codefendant. *Gall* does not justify the Tenth Circuit's new approach to §3553(a)(6), because "all that . . . *Gall* does is affirm that differently situated defendants can be sentenced differently." *Smart*, 518 F.3d, at 816 (Hartz, J., dissenting).

The Tenth Circuit's post-*Gall* interpretation of §3553(a)(6) implicates a recurring debate that has touched nearly all courts of appeals, yielding "diverse positions on whether the phrase 'unwarranted sentence disparities' in §3553(a)(6) permits consideration of co-defendants' sentences." *United States* v. *Wills*, 476 F.3d 103, 109, n.5 (CA2 2007); *United States* v. *Neufeld*, No. 06-12503, 2007 WL 1231755, at *1 (CA11 Apr. 26, 2007) (unpublished) ("Our sister circuits have split on whether section 3553(a)(6) permits consideration of sentence disparity among codefendants."); see *infra* Part II.A (discussing the circuits' divergent approaches to §3553(a)(6)). Because the Tenth Circuit's construction of §3553(a)(6) conflicts with better-reasoned decisions from the Seventh and Eleventh Circuits, distorts the plain meaning of the statute's text, and undermines the fundamental objective of both the provision and the Guidelines—to promote nationwide consistency in sentencing—the Court should grant the petition and hold that §3553(a) applies solely to nationwide sentencing disparities between similarly situated offenders.

A. The Courts of Appeals Have Adopted Conflicting Interpretations of §3553(a)(6).

The Tenth Circuit's holding conflicts with the Seventh and Eleventh Circuits' better-reasoned post-*Gall* interpretations of §3553(a)(6). The Seventh Circuit has reiterated, post-*Gall*, that it "refuses to view the discrepancy between sentences of codefendants as a basis for challenging a sentence." *Omole*, 523 F.3d, at 700. Instead, the Seventh Circuit "will only disturb a sentence based on an unjustifiable disparity between co-defendants . . . if it actually creates a disparity between the length of the appellant defendant's sentence and all other similar sentences imposed *nationwide*." *Ibid.* (internal quotation marks omitted).

Likewise, the Eleventh Circuit has confirmed that "[d]isparity between the sentences imposed on codefendants is generally not an appropriate basis for relief on appeal." *Vidal*, 2008 WL 1875965, at *4 (internal quotation marks omitted). As that court elaborated, "[i]f it were, we would be creating disparities between the sentences given the defendants in the case under review and those given similarly situated defendants in other cases." *Ibid.* And that is precisely the result against which §3553(a)(6) cautions. See, *e.g.*, *Smart*, 518 F.3d, at 816 (Hartz, J., dissenting) ("[T]he kind of 'disparity' with which §3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case." (quoting *United States* v. *Boscarino*, 437 F.3d 634, 638 (CA7 2006))).[7]

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[7] In passing, the Seventh and Eleventh Circuits have occasionally "imagine[d] a case" in which codefendant disparities might be considered, *United States* v. *Tanner*, 544

Despite the Seventh and Eleventh Circuits' faithful and well-reasoned interpretations of §3553(a)(6), a majority of courts side with the Tenth Circuit to varying degrees. While the Eighth Circuit requires consideration of codefendant disparities, *United States* v. *Walker*, 439 F.3d 890, 893-894 (CA8 2006), the Third, Fourth, Fifth, Sixth, and Ninth Circuits permit but do not mandate codefendant comparisons. See, *e.g.*, *United States* v. *Tankersley*, 537 F.3d 1100, 1116 (CA9 2008); *United States* v. *Cisneros-Gutierrez*, 517 F.3d 751, 767 (CA5 2008); *United States* v. *Simmons*, 501 F.3d 620, 623-624 (CA6 2007); *United States* v. *Anderson*, Nos. 06-4725, 06-4849, 2007 WL 2683715, at *2 (CA4 Sept. 12, 2007) (unpublished); *United States* v. *Parker*, 462 F.3d 273, 277-279 (CA3 2006). The First and Second Circuits have adopted less categorical approaches, recognizing certain circumstances when consideration of codefendant disparities may be permissible under other §3553(a) factors if not under (a)(6). See, *e.g.*, *United States* v. *Martin*, 520 F.3d 87, 94 (CA1 2008) (quoting 18 U.S.C. §3553(a)(2)(A) in suggesting that codefendant comparisons might be allowed if evaluated to "promote respect for the law, and to provide just punishment for the offense"); *United States* v. *Wills*, 476 F.3d 103, 110 (CA2 2007) (quoting 18 U.S.C. §3553(a)(1) in suggesting permissibility of codefendant comparisons evaluated in light of "the nature and circumstances of the offense" and "the history and characteristics of the defendant"). These

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F.3d 793, 797 (CA7 2008), but that dicta has not engaged, much less rejected, those circuits' well-reasoned, prior holdings on codefendant comparisons. See also *United States* v. *Castaing-Sosa*, 530 F.3d 1358, 1362 (CA11 2008); *United States* v. *Harris*, No. 08-10334, 2008 WL 4559806, at *3 (CA11 Oct. 14, 2008) (unpublished).

divergent approaches to §3553(a)(6), and to the issue of codefendant disparity as a proper §3553(a) consideration generally, invite inconsistent sentencing practices both nationwide and within districts, warranting the Court's immediate attention.

B. Permitting Consideration of Codefendant Disparities Under §3553(a)(6) Distorts the Provision's Text and Undermines Its Purpose.

The Tenth Circuit's interpretation of §3553(a)(6) distorts the plain language of the statute, which addresses "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6). As Mr. Wittig's case illustrates, being "codefendants" is not the same as being "found guilty of similar conduct," *ibid.*, and it was error for the Tenth Circuit to conflate the two concepts. Indeed, even the district court acknowledged that Mr. Wittig's codefendant was more culpable than Mr. Wittig, who never intended any loss. App. 63a. Additionally, Mr. Wittig's codefendant obstructed justice. Mr. Wittig did not. App. 63a. Mr. Wittig's codefendant committed an abuse of trust. Mr. Wittig did not. App. 63a. Mr. Wittig's codefendant, as the beneficiary of the loan, received a gross-receipts enhancement. Mr. Wittig did not. App. 76a.

Moreover, the Tenth Circuit's interpretation of §3553(a)(6) undermines the provision's purpose. Indeed, even courts that allow codefendant comparisons have recognized that their practice is inconsistent with congressional intent underlying §3553(a)(6). As the Second Circuit has observed, the Sentencing Reform Act of 1984, "whence the

language in § 3553(a)(6) comes," was intended "to eliminate disparity on a *national* level." *Fernandez*, 443 F.3d, at 31, n.9. And the Sixth Circuit has stated, post-*Gall*, that "the goal [of §3553(a)(6)] is not to eliminate disparities between any two defendants who have been found guilty of similar crimes." *Smith*, 510 F.3d, at 610. Instead, as the Sixth Circuit emphasized, "§3553(a)(6) is intended to ensure that there are no unwarranted disparities between the sentence of the defendant in question and the sentences of other defendants in the aggregate. A sample size of two defendants is not sufficient to show such a disparity." *Ibid.*; see also *United States* v. *Cisneros-Gutierrez*, 517 F.3d 751, 767 (CA5 2008) (considering codefendant disparities "relevant" but warning that a "microcosmic approach to sentencing disparities . . . would create its own set of disparities with other similarly situated defendants").

Legislative history bolsters these observations, explaining that §3553(a)(6) is intended to reduce unwarranted disparities by *discouraging* deviations from the Guidelines when sentencing courts consider offenses within the heartland of convictions the Guidelines were intended to address:

> "Subsection (a)(6) . . . underline[s] the major premise of the sentencing guidelines—the need to avoid unwarranted sentencing disparity. The subsection requires judges to avoid unwarranted disparity in applying the guidelines and particularly in deciding when it is desirable to sentence outside the guidelines." S. Rep. No. 98-225, p. 78 (1983).

See also *United States* v. *Boscarino*, 437 F.3d 634, 638 (CA7 2006) ("Sentencing disparities [under §3553(a)(6)] are at their ebb when the Guidelines are

followed."). This legislative history bolsters the observance of the unanimous concurrence in Mr. Wittig's case that the two factors under 18 U.S.C. §3553(a) that have "real teeth" and should be read together to promote nationwide uniformity are §3553(a)(4), which requires consideration of the Guidelines calculation, and §3553(a)(6), which directs district courts to avoid unwarranted nationwide disparities between similarly situated offenders. App. 17a-18a (Hartz, J., concurring).

Until the Court definitively construes §3553(a)(6) and determines whether sentencing courts may rely on codefendant comparisons, nationwide disparities in sentencing will be unnecessarily and unpredictably aggravated by the vast number of codefendant cases that pass through the federal system each year. The Court should grant the petition to ensure consistent treatment of codefendant sentencing disparities and should reverse the Tenth Circuit's judgment, effectuating Congress's intent under §3553(a)(6) by holding that the provision applies solely to disparities between similarly situated offenders nationwide.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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December 15, 2008

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed June 17, 2008]

No. 07-3051

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID C. WITTIG,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 02-CR-40140-JAR)

Richard L. Hathaway, Assistant United States Attorney (Eric F. Melgren, United States Attorney, and Christine E. Kenney, Assistant United States Attorney, with him on the brief), Kansas City, Kansas, for Plaintiff - Appellee.

Lisa R. Eskow of Weil, Gotshal & Manges (Steven Alan Reiss, J. Nicholas Bunch, and Carol A. Funk, with her on the briefs), Austin, Texas, for Defendant - Appellant.

Before **HARTZ, O'BRIEN** and **HOLMES**, Circuit Judges.

O'BRIEN, Circuit Judge.

David C. Wittig appeals – for the third time – from his sentence for conspiracy, bank fraud and money laundering. We vacated his first two sentences (51 months imprisonment and 60 months imprisonment). *United States v. Weidner*, 437 F.3d 1023 (10th Cir. 2006) (*Wittig I*); *United States v. Wittig*, 206 Fed. Appx. 763 (10th Cir. 2006) (unpublished) (*Wittig II*). The district court has now sentenced Wittig to 24 months imprisonment, followed by a three-year term of supervised release with special conditions, including an occupational restriction. *United States v. Wittig*, 474 F. Supp. 2d 1215 (D. Kan. 2007) (*Wittig III*). Wittig appeals from the prison sentence and the occupational restriction. Exercising jurisdiction pursuant to 18 U.S.C. § 3742(a), we affirm the sentence but reverse the occupational restriction.

I. BACKGROUND

We will not repeat all of the facts underlying Wittig's appeal, as they are set forth in detail in our two previous decisions. *See Wittig I*, 437 F.3d at 1027-32; *Wittig II*, 206 Fed. Appx. at 764-68. For present purposes, it is sufficient to state Wittig loaned $1.5 million to Clinton Odell Weidner II, the former president, chief executive officer, and general counsel of Capital City Bank in Topeka, Kansas. At the time he made the loan, Wittig was a customer of the bank and was chairman of the board, president and chief executive officer of Western Resources, Inc. (now Westar Energy, Inc.), the largest electric utility in Kansas. Both Wittig and Weidner intended to profit from the loan (in different ways) and both

concealed the loan from the bank through false documentation.[1]

Wittig and Weidner were convicted of one count of conspiracy to submit false entries to a federally insured bank and to launder money in violation of 18 U.S.C. § 371; four counts of making a false bank entry in violation of 18 U.S.C. § 1005; and one count of money laundering in violation of 18 U.S.C. § 1957. Wittig was sentenced to 51 months imprisonment.[2] In arriving at this sentence, the court looked to the 2002 version of the United States Sentencing Guidelines, which were mandatory at the time. It determined Wittig's base offense level was 6. *See* USSG §2B1.1(a). It then applied two enhancements – the intended loss enhancement, USSG §2B1.1(b)(1), and the gross receipts enhancement, USSG §2B1.1(b)(12)(A)[3] – bringing Wittig's total offense level to 24. With a Criminal History Category of I, Wittig's guideline range was 51 to 63 months imprisonment.

In *Wittig I*, we affirmed Wittig's conviction but vacated his sentence and remanded for resentencing. 437 F.3d at 1027. We concluded the court erred in applying the gross receipts enhancement because the

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[1] Wittig made over $90,000 on the loan, based on the difference between the interest charged to Wittig by the bank and the interest Wittig charged to Weidner. Wittig also obtained an increase in his line of credit.

[2] Weidner was originally sentenced to 78 months imprisonment. We vacated that sentence. *Wittig I*, 437 F.3d at 1049-50. On remand, Weidner was sentenced to 60 months imprisonment. We affirmed. *United States v. Weidner*, 209 Fed. Appx. 826, 827 (10th Cir. 2006) (unpublished).

[3] This provision was renumbered as USSG §2B1.1(b)(13)(A) in the 2005 version of the guidelines.

gross receipts from the offense had been properly attributed to Weidner and could not also be attributed to Wittig. *Id.* at 1046-47. We also determined the court erred in applying the intended loss enhancement because it did not adequately consider the collateral pledged by Wittig and did not find Wittig intended to deprive the bank of this collateral. *Id.* at 1048. On the basis of these errors, we remanded for resentencing. We noted the guidelines were no longer mandatory and instructed resentencing be conducted consistent with *United States v. Booker*, 543 U.S. 220 (2005). *Id.*

On remand, the court again used the intended loss and gross receipts enhancements to calculate Wittig's offense level. In justifying its use of the intended loss enhancement, the court acknowledged some credit should be given to the collateral pledged by Wittig, but discounted the value of the collateral, finding it was not "secured in a very secure fashion." *Wittig II*, 206 Fed. Appx. at 767 (quotations omitted). The court considered evidence from a related case involving Wittig and determined the bank fraud at issue here "was part of a larger scheme in which [Wittig] intended to cause loss to Westar Energy of more than $1 billion." *Id.* at 767-68 (quotations omitted).[4] The court determined Wittig's total offense level was 24, resulting in a guideline range of 51 to 63 months

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[4] In a separate case, Wittig was prosecuted for thirty-nine counts of wire fraud, money laundering, conspiracy and circumvention of internal financial controls in relation to his position as president, chief executive officer and chairman of the board of Westar Energy, Inc. His first trial ended in a hung jury. He was convicted on all counts in his second trial but we reversed. *See United States v. Lake*, 472 F.3d 1247, 1250, 1253-54 (10th Cir. 2007).

imprisonment. The court imposed a sentence of 60 months. The court determined the sentence was reasonable under the 18 U.S.C. § 3553(a) factors[5] and would be appropriate even if the intended loss and gross receipts enhancements did not apply.

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[5] Section 3553(a) provides in pertinent part:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in . . . this subsection. The court, in determining the particular sentence to be imposed, shall consider-

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ;

(5) any pertinent policy statement . . . ;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

In *Wittig II*, we held: "[T]he district court again erred in computing Mr. Wittig's offense level under the Guidelines. The base offense level for Mr. Wittig's crime was 6. The only potential grounds for increasing it would be the gross receipts enhancement or the intended loss enhancement. Neither ground applies." 206 Fed. Appx. at 769 (citations omitted). We determined the court had disregarded *Wittig I* and impermissibly reapplied the gross receipts enhancement. *Id.* We also held the court erred in applying the intended loss enhancement because "we have been pointed to no evidence that Mr. Wittig intended the Bank to lose any money on its loan to him." *Id.* at 769-70. We rejected the government's argument that the sentence should be affirmed notwithstanding the district court's miscalculation of the offense level. *Id.* at 770. We stated: "[A]lthough the court gave reasons why it believed the imposed sentence was reasonable, it failed to explain what dramatic facts justified such an extreme divergence from the best estimate of Congress's conception of reasonableness expressed in the Guidelines." *Id.* (quotations omitted). We stated that to justify a non-guidelines sentence, "[t]he court would need to explain what the Guidelines failed to take into account and why that omitted factor is of such enormous consequence." *Id.*

The court has now sentenced Wittig to 24 months imprisonment. In arriving at this sentence, the court recognized "*Wittig II* clearly ruled that the applicable Guidelines range in this case is 0-6 months . . . ." 474 F. Supp. 2d at 1226. However, the court determined the guidelines failed to take into account the "dramatic facts" of the case and thus imposed a sentence 18 months greater than the upper end of the

guidelines range, a 300% variance.[6] *Id.* at 1233. The court explained "a term of imprisonment of 24 months is sufficient, but not greater than necessary to comply with the purposes set forth in [§ 3553(a)]." *Id.* at 1234. The court also imposed a three-year term of supervised release with four special conditions, including an occupational restriction: "The defendant shall not be employed in any capacity in which he will have executive authority over any business, company or agency, and shall not engage in any financial agreements or negotiations involving any business, company or agency without the prior approval of the Court." (R. Vol. II at 270.) On appeal, Wittig challenges the reasonableness of the sentence and the imposition of the occupational restriction as a special condition of supervised release.[7]

II. DISCUSSION

A. The Sentence

Since *Booker*, this Court has reviewed sentences for reasonableness, guided by the factors set forth in 18 U.S.C. § 3553(a). *United States v. Kristl*, 437 F.3d 1050, 1053 (10th Cir. 2006). Reasonableness has both a procedural component, encompassing the method by which the sentence is calculated, and a substantive component, which relates to the length of the sentence. *Id.* at 1055. In *United States v. Smart*,

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[6] "When a court enhances or detracts from the recommended [guideline] range through application of § 3553(a) factors . . . the increase or decrease is called a 'variance.'" *United States v. Atencio*, 476 F.3d 1099, 1101 n.1 (10th Cir. 2007).

[7] Wittig was released from custody on February 12, 2007, pending our resolution of this appeal. At the time of his release, he had served over 12 months in prison.

we noted it would be procedural error if a court failed to consider the § 3553(a) factors or considered factors outside the scope of § 3553(a). 518 F.3d 800, 803-04 (10th Cir. 2008). A challenge to the sufficiency of the § 3553(a) justifications, on the other hand, raises a substantive challenge. *Id.* at 804. Wittig appears to be raising both a procedural and substantive challenge to his sentence. He contends the district court considered factors that were improper under § 3553(a)(1), (a)(2)(A) and (a)(6) (procedural error) and arrived at an unreasonable sentence in weighing the § 3553(a) factors (substantive error). Our review is for an abuse of discretion. See *Gall v. United States*, — U.S. —, 128 S. Ct. 586, 591 (2007); *Rita v. United States*, — U.S. —, 127 S. Ct. 2456, 2465 (2007) ("appellate 'reasonableness' review merely asks whether the trial court abused its discretion").

1. Procedural Error

In arriving at a sentence, a district court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant" and "the need for the sentence imposed — [ ] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(1), (a)(2)(A). The district court determined the advisory guideline range (0 to 6 months) did not adequately account for these factors because Wittig was involved in a fraudulent scheme involving a financial institution; he intended to profit (and did profit) from the fraud; and the fraud involved $1.5 million in gross receipts. *See Wittig III*, 474 F. Supp. 2d at 1234-35. Having concluded the guidelines did not adequately account for the specific circumstances of the case, the court looked to the intended loss and gross receipts

enhancements as guideposts for determining a proper sentence. *See id.* at 1234, 1238. As acknowledged by the court, *Wittig I* and *II* specifically foreclosed application of these enhancements. They did not, however, foreclose consideration of these enhancements. While this may seem a fine point, we have previously held it is not improper for a sentencing court to look to the guidelines in search of a sentencing guidepost. *See, e.g.*, *United States v. Mateo*, 471 F.3d 1162, 1168-69 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 2890 (2007); *United States v. Wolfe*, 435 F.3d 1289, 1304 n.12 (10th Cir. 2006). We discern no procedural error in the court's use of the intended loss and gross receipts enhancements as guideposts.[8]

A sentencing court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). While the district court acknowledged the dissimilarities between Wittig and Weidner, it noted they were convicted of the same crimes and had the same criminal histories. *Wittig III*, 474 F. Supp.2d at 1236-37. The court determined it was not improper for them to have disparate sentences, but felt it necessary to reduce the disparity, and concluded a 60 month sentence for Weidner and a 24 month sentence for Wittig adequately accounted for their differences. *Id.* at 1237. Our case law instructs: "Ordinarily, the disparity between co-defendants' sentences is not

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[8] It is clear the court did not actually *apply* these enhancements. Had the court applied only the intended loss enhancement, the guideline range would have been 41 to 51 months imprisonment. *See* 474 F. Supp.2d at 1235. Had the court applied only the gross receipts enhancement, the guideline range would have been 51 to 63 months. *Id.*

grounds for relief." *United States v. Shaw*, 471 F.3d 1136, 1140 (10th Cir. 2006). However, as we noted in *Smart*, "codefendant disparity is not a per se 'improper' factor" post-*Gall*. 518 F.3d at 804. District courts "may compare defendants when deciding a sentence." *Id.* Thus, the court did not commit procedural error in considering the disparity between Wittig and Weidner's sentences.

2. Substantive Error

Wittig contends the sentence imposed is substantively unreasonable and not supported by the § 3553(a) factors. The court stated the sentence was appropriate because of the "dramatic" facts. *Wittig III*, 474 F. Supp 2d at 1233. While we question whether the facts are indeed "dramatic," that is no longer the starting point for our review. We may "take the degree of variance into account and consider the extent of a deviation from the Guidelines," *Gall*, 128 S. Ct. at 595, but our analysis does not change based on the degree of the variance.[9] *Smart* instructs:

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[9] Prior to *Gall*, we reviewed sentences outside the calculated guideline range on a sliding scale, requiring a more compelling justification the farther the sentence diverged from that range. *See, e.g., Mateo*, 471 F.3d at 1169 ("[H]ow compelling the justification must be to render an extra-Guidelines sentence reasonable is proportional to the extent of the difference between the advisory range and the sentence imposed.") (quotations omitted). In *Gall*, the Supreme Court "reject[ed] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." 128 S. Ct. at 595. The Court held such an approach "come[s] too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Id.*

> [W]e must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance . . . .It is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable, and we must therefore defer not only to a district court's factual findings but also to its determinations of the weight to be afforded to such findings.

518 F.3d at 808 (quotations and citation omitted). This standard of review does not change "even if the facts of the case are less than extraordinary." *Id.*

Though a 24 month sentence was certainly not the only reasonable sentence the district court could have arrived at, we discern no abuse of discretion. The court determined the variance "is necessary to afford adequate deterrence to bank customers who are aiders and abettors to nominee loans with bank officers . . . ." *Wittig III*, 474 F. Supp. 2d at 1237. We cannot disagree. As we stated in *United States v. McComb*, while "we recognize that in many cases there will be a range of possible outcomes the facts and law at issue can fairly support; rather than pick and choose among them ourselves, we will defer to the district court's judgment so long as it falls within the realm of these rationally available choices." 519 F.3d 1049, 1053 (10th Cir. 2007), *cert. denied*, — S.Ct. —, 2008 WL 717725 (2008).

B. The Occupational Restriction

Over Wittig's objection, the district court imposed an occupational restriction as a special condition of supervised release. The restriction prohibits Wittig from being employed as an executive and engaging in any financial agreements or negotiations in a

professional capacity without first obtaining court approval. "The district court generally enjoys broad discretion in setting a condition of supervised release." *United States v. Erwin*, 299 F.3d 1230, 1232 (10th Cir. 2002). Accordingly, we review special conditions of supervised release for abuse of discretion. *United States v. Edgin*, 92 F.3d 1044, 1047 (10th Cir. 1996).

Wittig contends the court abused its discretion in imposing this "sweeping employment restriction." (Appellant's Opening Br. at 35.) Wittig claims this condition renders him virtually unemployable as an executive because of the judicial oversight it entails. He asserts the restriction bears no reasonable relation to the conduct for which he was convicted and is not narrowly tailored to achieve its objective. The government contends the restriction is reasonable because it does not absolutely prohibit Wittig from engaging in financial agreements or negotiations but merely requires he obtain court approval before doing so. The government asserts the restriction is reasonably related to the conduct for which Wittig was convicted because, *inter alia*, Wittig "was involved in this transaction and carried out aspects of the conspiracy while the chief executive of a utility." (Appellee's Br. at 22.)

The district court has discretion to impose an occupational restriction as a special condition of supervised release, but its discretion must be exercised in accordance with 18 U.S.C. §§ 3583(d) and 3563(b) and USSG §5F1.5. Section 3583(d) provides in pertinent part:

> The court may order, as a further condition of supervised release, to the extent that such condition—

> **(1)** is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
>
> **(2)** involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
>
> **(3)** is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);
>
> any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20) . . . .

Section 3563(b)(5) sets forth occupational restrictions as a discretionary condition of probation. This section states:

> The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant . . . refrain . . . from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.

USSG § 5F1.5 implements § 3583(d). Subsection (a) states that a sentencing court may impose an occupational restriction "only if it determines":

(1) a reasonably direct relationship existed between the defendant's occupation, business or profession and the conduct relevant to the offense of conviction; and

(2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.

Moreover, an occupational restriction "shall [be] impose[d] . . . for the minimum time and to the minimum extent necessary to protect the public." USSG § 5F1.5(b).

In rejecting Wittig's objection to the occupational restriction, the court tersely explained:

> [The] conditions of supervision are directly connected to the underlying offenses for which defendant Wittig was convicted. Defendant Wittig was convicted of fraud and conspiracy to commit fraud that involved financial transactions. Specifically, he was found guilty in a scheme that involved false and misleading statements made on financial documents. If defendant Wittig were to have executive authority, or conduct financial transactions on behalf of a business entity, he would be responsible for a multitude of financial documents. As a result, the conditions are reasonably related to the nature and circumstances of the offense and the history and characteristics of this defendant.

474 F. Supp. 2d at 1225. The court stated: "[T]hese conditions do not involve a greater deprivation of

liberty or property than is necessary. Defendant Wittig is not prohibited entirely from engaging in the activities . . . ; he simply must obtain permission from this Court before doing so." *Id.* These conclusory statements do not satisfy the requirements of the statutory and guideline provisions discussed above.

First, in order for an occupational restriction to be warranted, there must be a "reasonably direct relationship . . . between the defendant's . . . profession and the conduct relevant to the offense of conviction." USSG §5F1.5(a)(1); *see also* 18 U.S.C. 3563(b)(5) (requiring that the occupational restriction "bear[ ] a reasonably direct relationship to the conduct constituting the offense"). Where, as here, the restriction relates to a management position, the "disqualification must bear a reasonable relationship to an abuse of the management position for a criminal purpose." S. REP. NO. 98-225, at 96 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3279. The court did not explain how the restriction was connected to Wittig's abuse of a management position for a criminal purpose. The offense of conviction was based on Wittig's personal conduct, not his conduct as an executive. Wittig used his personal line of credit to effect a nominee loan to a bank employee and failed to disclose the loan to the bank. The mere fact Wittig engaged in such conduct while employed as an executive does not establish the necessary connection between the conduct and his management/executive positions.

Second, an occupational restriction must be "reasonably necessary to protect the public," which requires a finding that, in the absence of the restriction, "the defendant will continue to engage in unlawful conduct similar to that for which the

defendant was convicted." USSG §5F1.5(a)(2); *see Erwin*, 299 F.3d at 1232 ("[T]he district court is required to determine that without the prohibition [the defendant] will continue to engage in criminal conduct similar to that for which he was convicted . . . ."). Here, the court did not find Wittig would continue to engage in unlawful conduct absent the restriction. It noted only that if Wittig were to have executive authority, he would be responsible for a multitude of financial transactions. This is not sufficient.

Third, an occupational restriction "shall [be] impose[d] . . . for the minimum time and to the minimum extent necessary to protect the public." USSG §5F1.5(b); *see also United States v. Souser*, 405 F.3d 1162, 1167 (10th Cir. 2005) (noting the "use of the word 'shall' [in §5F1.5(b)] makes clear the mandatory nature of the court's finding that the occupational restriction is the minimum restriction necessary"). The restriction must entail no greater deprivation of liberty than is necessary. *See* 18 U.S.C. §§ 3583(d), 3563(b)(5). Here, there is no indication the court considered any less restrictive alternatives. This constitutes reversible error. *See Souser*, 405 F.3d at 1167 (concluding the district court's error was not harmless because "nothing in the record establishes that the court considered whether the public could be equally protected by lesser restrictions").

On these facts, an occupational restriction cannot satisfy the requirements of 18 U.S.C. §§ 3583(d) and 3563(b) and USSG §5F1.5. We **REVERSE** the fourth special condition of supervised release and remand with instructions to eliminate that condition. In all other respects, we **AFFIRM**.

07-3051 – *United States v. Wittig*

HARTZ, Circuit Judge, joined by O'BRIEN and HOLMES, Circuit Judges, concurring:

I join fully in Judge O'Brien's opinion. I write separately only to express my disagreement with this court's recent jurisprudence regarding substantive reasonableness of sentences.

This court's present approach appears to be that a sentence is substantively reasonable if the sentencing judge provides reasons for the length of the sentence. *See United States v. Muñoz-Nava*, 524 F.3d 1137, 1142-43 (10th Cir. 2008). To be sure, some reasons would be out-of-bounds, such as the defendant's race or name. But district judges are reasonable people, and I would be surprised if we ever see an irrational sentence. We will, however, see great inequality in sentencing. Reasonable people differ on how lenient or harsh sentences should be, both in general and for particular crimes and particular types of offenders. The resulting inequalities will have our imprimatur. Under this court's present approach we may go through the motions of substantive-reasonableness review, but it will be an empty gesture.

I think that a different approach is appropriate. Sentencing judges are required to consider the factors set forth in 18 U.S.C. § 3553(a). Some of those factors do not seriously constrain the judge's discretion. Every judge will unavoidably consider "the nature and circumstances of the offense and the history and characteristics of the defendant," *id.* § 3553(a)(1); yet we all know that reasonable people can reach strikingly different conclusions regarding what sentence is proper in light of those considerations. Two of the factors, however, have real teeth, and

should be a matter of concern to appellate courts that wish to effectuate congressional intent that we be a nation of equal justice under law, in which the length of time that a defendant is deprived of liberty does not depend primarily and significantly on who the sentencing judge happens to be. These two factors are the sentencing range in the Sentencing Guidelines, *id.* § 3553(a)(4), and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(6).

In my view, a sentence is substantively unreasonable if the only reason that the length is outside the range of what judges ordinarily impose for "defendants with similar records who have been found guilty of similar conduct" is that the sentencing judge has an idiosyncratic view of the seriousness of the offense, the significance of the defendant's criminal history and personal qualities, or the role of incarceration in the criminal-justice system. Determining whether a particular judge has idiosyncratic views could be problematic, except that the United States Sentencing Commission has, in large part, developed its Sentencing Guidelines by studying the sentences being handed down by district judges throughout the country. *See Kimbrough v. United States*, 128 S. Ct. 558, 574-75 (2007). Thus, the consideration of the Guidelines Sentencing range required by § 3533(a)(4) [sic] ordinarily provides the sentencing judge with knowledge of sentencing practice within the federal judiciary. A significant variance from that practice should be considered unreasonable if it can be justified only by disagreement with the general views of other judges.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 02-40140-02-JAR

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID C. WITTIG,
Defendant.

MEMORANDUM AND ORDER

By order of the Tenth Circuit filed November 22, 2006, this case was remanded to this Court for resentencing. A sentencing hearing was held on February 5, 2006. After admitting evidence and hearing arguments and statements of counsel, the Court made extensive rulings from the bench. The Court now issues the following statement of reasons, pursuant to 18 U.S.C. § 3553(c), memorializing its rulings on objections to the presentence report ("PSR") and on the issues raised in the parties' sentencing memoranda.[1] For the reasons stated on the record and as supplemented herein, the Court sentences defendant to a term of 24 months' imprisonment.

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[1] On January 10, 2007, Wittig filed a Motion to Expedite Sentencing Hearing and for Release on Conditions (Doc. 346). The Court addresses the appeal bond in this case in a separate order.

I. Procedural History

The underlying facts of this case are well recited in a published opinion by the Tenth Circuit, *United States* v. *Weidner*[2] ("*Wittig I*"), and will not be repeated here, except as necessary to explain the Court's ruling. Highly summarized, this case involved a nominee loan between defendant David Wittig and the President and General Counsel of Capital City Bank (the "Bank"), co-defendant Clinton Odell Weidner, that was concealed by false documents submitted to the Bank by both men. After a jury trial, both defendant Wittig and co-defendant Weidner were convicted of conspiracy [18 U.S.C. § 371], bank fraud [18 U.S.C. § 1005], and money laundering [18 U.S.C. § 1957]. Because of the protracted nature of the post-trial proceedings, however, a review of the procedural history is instructive.

A. First Sentencing—February 27, 2004

In its first sentence, this Court found a base offense level of 6 under U.S.S.G. § 2B1.1(a) (2001). The Court enhanced that offense level under two provisions: (1) by finding an "intended loss" to the Bank of $1.5 million, the Court enhanced the offense level by 16 under § 2B1.1(b)(1)(I); and (2) by applying the "gross receipts enhancement" of § 2B1.1(b)(12)(A), which applies if the defendant "derived more than $1 million in gross receipts from one or more financial institutions as a result of the offense." The gross receipts provision required an offense level of at least 24, regardless of the intended loss enhancement. The Court applied the gross receipts enhancement to both Wittig and Weidner for the same $1.5 million in

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[2] 437 F.3d 1023 (10th Cir. 2006) [hereinafter "*Wittig I*"].

nominee loan proceeds, resulting in a total offense level of 24. Based on defendant Wittig's criminal history calculation of I, his resulting sentencing range was 51-63 months' imprisonment. The Court sentenced defendant Wittig to 51 months' imprisonment and fined him $1 million. The Court imposed a 78-month sentence on co-defendant Weidner after imposing enhancements for abuse of trust based on his position with the Bank and obstruction for providing false testimony during the sentencing hearing. The Court granted defendant Wittig's appeal bond request, and he appealed his convictions and his sentence.

On December 3, 2003, the United States filed an Indictment against defendant Wittig and Douglas Lake on charges relating to their employment at Westar Energy, Inc., *United States* v. *Wittig*, Case No. 03-40142-JAR (the "Westar case"). The first trial of the Westar case commenced October 12, 2004, and ended December 20, 2004, with a hung jury on all counts resulting in the declaration of a mistrial. Retrial commenced June 14, 2005, and concluded September 15, 2005, with defendant Wittig convicted on all 39 counts, and Lake convicted of 30 counts. The jury also returned partial forfeiture verdicts. The Court imposed a 216-month (18 year) sentence on defendant Wittig and a 180-month (15 year) sentence on co-defendant Lake in the Westar case. These convictions were recently reversed by the Tenth Circuit, with remand of some counts, for potential retrial.[3]

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[3] *United States v. Lake*, —F.3d—, 2007 WL 30038 (10th Cir. Jan. 5, 2007). The government has been granted until February 20, 2007, to seek a petition for rehearing.

B. First Tenth Circuit Remand for Resentencing

On February 16, 2006, the Tenth Circuit (Henry, Lucero, JJ.; Brack, D.J.) affirmed both Wittig and Weidner's convictions, but remanded for resentencing.[4]

1. Gross Receipts

The court in *Wittig I* first ruled that this Court erred in applying the gross receipts enhancement because it applied the same $1.5 million gross receipts to both Wittig and Weidner. The court cited the Guideline commentary that the enhancement was to apply "if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000."[5] After discussing the case law cited by the parties in support of their respective positions, the court stated:

> In our view, the various decisions cited by Mr. Wittig and the government are distinguishable from the instant case in important respects. The decisions upon which Mr. Wittig relies do indicate that the same receipts cannot be counted against more than one defendant. However, unlike this case against Mr. Wittig and Mr. Weidner, none of these cases involved a series of offenses in which each defendant successively used the receipts in a separate fashion (with one defendant, Mr. Wittig, obtaining money from a bank and then earning interest by loaning that money to his codefendant Mr. Weidner, and the

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[4] *Wittig I*, 437 F.3d 1023 (10th Cir. 2006).

[5] *Id.* at 1045-47 (citing U.S.S.G. § 2B1.1 cmt. n.9 (2001)).

codefendant, Mr. Weidner, using the proceeds of the loan to profit from a real estate investment).

Conversely, the Third Circuit decision on which the government relies does not involve the attribution of the same receipts to codefendants or to the defendant and another person who somehow participated in the criminal scheme. In *Bennett*, the defendant argued that he did not receive certain receipts of the offense of conviction "because he subsequently transferred much of the money to consultants and others who did work for [his company]." In rejecting that argument, the Third Circuit did state that "it is irrelevant how [the defendant] spent the money after he obtained it." However, there is no indication in the Third Circuit's opinion that the individuals to whom the defendant transferred the receipts were codefendants or otherwise participated in the criminal scheme. Thus, *Bennett* does not offer the government a way around the Guideline language stating that the sentencing court may consider "gross receipts to the defendant individually, rather than to all *participants*."[6]

The court went on to rule that

In light of the ambiguity of the Guideline language, the lack of case law resolving the issue of how to attribute receipts in these circumstances, and the lack of persuasive argument from the government, we conclude that the district court erred in attributing the $1.5

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[6] *Id.* at 1046 (quoting *United States v. Bennett*, 161 F.3d 171, 193 (3d Cir. 1998); U.S.S.G. § 2B1.1 cmt. n.9 (2001) (emphasis added)).

> million in gross receipts to both Mr. Wittig and Mr. Weidner.[7]

In so ruling, the court noted in footnote 2 that the government also argued in its appellate brief that Wittig obtained additional gross receipts from the offenses.

> The government cites interest on the promissory note from Mr. Weidner (more than $90,000) as well as the two additional $500,000 increases in his line of credit that Mr. Wittig obtained in May and June 2001. However, the district court did not rely on these transactions in determining the amount of gross receipts received by Mr. Wittig, and we decline to consider these transactions for the first time on appeal.[8]

Finally, with respect to gross receipts, the court observed that in the post-*Booker* regime, the district court, in determining the "nature and circumstances of the offense" under 18 U.S.C. § 3553(a), could consider that both defendants used the $1.5 million:

> The § 3553 factors include "the nature and circumstances of the offense." In our view, the circumstances of these offenses include those noted by the government here—that Mr. Wittig and Mr. Weidner each used the $1.5 million from the line of credit increase in different ways and derived some benefit from it. Thus, the district court may properly consider this aspect of the

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[7] *Id.* at 1046-47 (citing *United States v. Gay*, 240 F.3d 1222, 1232 (10th Cir. 2001) ("The rule of lenity requires courts to interpret ambiguous statutes, including the Sentencing Guidelines, in favor of criminal defendants.")).

[8] *Id.* at 1047 n.2 (internal citation omitted).

offenses in resentencing under the post-*Booker* regime.[9]

2. Intended Loss

The court in *Wittig I* also found that in adding 16 levels to the base offense level established by an "intended loss" to the Bank of $1.5 million, this Court failed to adequately consider the collateral that defendant Wittig had pledged to secure his line of credit.[10] The court stated:

> Although there are instances in which a district court may ignore collateral in determining intended loss, the court must first determine that the defendant intended to deprive the lender of its collateral. The district court did not make such findings. The facts noted by the district court—that Mr. Wittig provided no new collateral for the $1.5 million increase in his line of credit and that amount of collateral provided did not comport with the bank's rules—might justify the disregard of some of the collateral pledged. However, absent further explanation and findings, we cannot see how those facts justify a disregard of all the collateral pledged by Mr. Wittig in calculating the amount of intended loss.[11]

C. First Resentencing on Remand—April 24, 2006

On resentencing, this Court once again applied the gross receipts enhancement to find an offense level of

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[9] *Id.* (internal citation omitted).

[10] *Id.* at 1048.

[11] *Id.* (emphasis in original).

24. In so doing, the Court reasoned that the *Wittig I* decision did not preclude this enhancement, provided the Court articulated the separate and individual use defendant Wittig made of the $1.5 million. The Court also reapplied the same intended loss calculation, this time after explicitly stating that it was considering the collateral defendant Wittig had pledged to secure the line of credit.

With respect to gross receipts, the Court stated that it interpreted the decision in *Wittig I* to say that under the Guidelines, the gross receipts enhancement could not be applied because the Court "did not articulate separate and independent and individual use of the gross receipts."[12] The Court disagreed with the defendant that *Wittig I* made clear that the rule of lenity would require only one defendant be attributed with those gross receipts.[13] The Court went on to find that defendants Wittig and Weidner treated the $1.5 million in "very different, separate, independent, and individual manners."[14] Specifically,

> Wittig used this $1.5 million to increase his line of credit at Capital City Bank by $1.5 million so that forevermore his lending power increased at that institution by $1.5 million. This increase bore interest at an annual rate of 5.39 percent.
>
> Weidner used the $1.5 million in gross receipts to fund an investment in a real estate venture in Arizona; with a profit motive, of course.[15]

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[12] (Tr., Doc. 337 at 10.)

[13] (*Id.* at 11.)

[14] (*Id.* at 31.)

[15] (*Id.* at 32.)

The Court further noted that defendant Wittig used the $1.5 million in several manners. First, he received an increase in his line of credit, which he subsequently used for draws for other purposes.[16] Second, he used the proceeds as a quid pro quo to obtain Weidner's help in getting a financing package for Wittig and others to buy into the Westar Industries' rights offering, an investment that Wittig projected would yield him $30 to $60 million of profit; this quid pro quo was an overt act in the conspiracy charge in the Westar case.[17] Third, Wittig used the proceeds as a personal investment, in a loan to Weidner, with interest.[18]

After much analysis, the Court finally noted that:

> In any event, even if the $1.5 million is not properly attributed to Wittig under the gross receipts analysis, this is, as the Tenth Circuit noted, a factor concerning the nature and circumstances of the offense that warrants, in this Court's view, a sentence that comports with the guideline level applicable to an offense involving either an intended loss or a gross receipt by Wittig of $1.5 million.[19]

With respect to intended loss, the Court noted that the collateral pledged constituted fruits of the fraud.[20] To say that this line of credit was adequately secured would be to overlook the obvious, as it was secured with property that was subject to forfeiture in the

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[16] (*Id.* at 34.)

[17] (*Id.*)

[18] (*Id.* at 36.)

[19] (*Id.* at 47.)

[20] (*Id.* at 37.)

Westar case.[21] The Court stressed that, in any event, the borrower's ability to pay is not an appropriate credit against intended loss, citing the so-called "rich man's credit."[22] The Court acknowledged nevertheless that it must take into consideration the fact that there was collateral, stating:

> But in terms of the 3553 analysis, the Court also has to take into consideration the nature of the collateral pledged and the fact that it was the fruit of a fraud that defendant Wittig committed on Westar Energy.[23]

The Court went on to state that it also takes into consideration the intended loss with respect to Westar, noting that the very conduct that this defendant is being sentenced on was a part of the Westar case.[24]

Following its perceived guidance in *Wittig I*, the Court stated:

> So I am, in essence, applying both the gross receipts guideline and the intended loss guideline. They are guidelines that can be applied in the alternative. And I'm specifically finding that even if the gross receipts guideline did not apply or the intended loss would not apply, the underlying nature and circumstances that I've outlined in great detail here would still

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[21] (*Id* at 38.)

[22] (*Id.*)

[23] (*Id.* at 39.)

[24] (*Id.* at 39-40.)

> counsel this Court under 3553 to apply the sentence that I'm about ready to announce.[25]

The Court then found an offense level of 24, a criminal history category of I, and imposed a sentence of 60 months' imprisonment and a $1 million fine. The Court also reduced co-defendant Weidner's sentence from 78 months to 60 months.

The Court specifically discussed § 3553(a) factors in conjunction with its discussion of the Guideline analysis. As noted above, the Court made clear that, even in the event the Guidelines did not apply, it would render the same sentence under the § 3553(a) factors. In its announcement of sentence, however, the Court recited general language regarding the factors.[26] The Court began by emphasizing its reliance on the Guidelines.[27] It then noted defendant's failure to accept responsibility, evidence that he had engaged in new criminal behavior while on appeal bond, the lack of mitigating factors, and the seriousness of his offense.[28] The Court expressed its belief that the sentence imposed promoted respect for the law and provided just punishment and that defendant's conduct justified a sentence the same length as Weidner's.[29] Finally, the Court stated that the sentence would protect the public and deter further criminal behavior.[30] Subsequently, there was an apparent administrative error in filing the Statement of Reasons, which left unmarked the

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[25] (*Id.* at 48.)

[26] (*Id.* at 50-55.)

[27] (*Id.* at 51.)

[28] (*Id.* at 52-54.)

[29] (*Id.*)

[30] (*Id.*)

section in which the Court must explain why it imposed a non-Guideline sentence.[31] In any event, the Court explained this in its oral ruling, which was recorded in a 66-page transcript of the sentencing hearing.[32]

D. Second Tenth Circuit Remand for Resentencing

In an unpublished decision dated November 22, 2006, the Tenth Circuit (Hartz, McWilliams and McConnell, JJ.) again reversed the Court's sentence and remanded for a third sentencing hearing.[33]

Wittig II begins by stating the two-step analysis for reviewing a sentence post-*Booker*: (1) it must determine whether the district court considered the applicable Guidelines range, reviewing its legal conclusions de novo and its factual findings for clear error; a non-harmless error in this calculation entitles the defendant to a remand for resentencing; and (2) if the district court correctly applied the Guidelines or any errors were harmless, the court considers whether the ultimate sentence was reasonable.[34]

1. Guidelines Application

The court in *Wittig II* began its analysis by stating:

> We hold that the district court again erred in computing Mr. Wittig's offense level under

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[31] (Doc. 315.)

[32] (Doc. 337.)

[33] *United States v. Wittig*, No. 06-3166, 2006 WL 3378451 (10th Cir. Nov. 22, 2006) [hereinafter "*Wittig II*"].

[34] *United States v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006).

> the Guidelines. The base offense level for Mr. Wittig's crime was 6. The only potential grounds for increasing it would be the gross-receipts enhancement or the intended-loss enhancement. *Neither ground applies.*[35]

Wittig II agreed with defendant that the Court disregarded *Wittig I's* holding and impermissibly reapplied a gross receipts enhancement to determine his offense level.[36] *Wittig II* stated that this Court read *Wittig I*'s opinion to say that it was error to apply the $1.5 million in gross receipts to both defendants because "the district court did not articulate separate and independent and individual use of the gross receipts."[37] *Wittig II* then explained,

> We do not share that reading. On the contrary, after noting the distinguishing factors in Mr. Wittig's case, we still proceeded to hold that Mr. Wittig was correct in challenging the applicability to his case of the gross-receipts guideline. *The only use we permitted the district court to make of the "gross-receipts" facts on remand was to consider them under § 3553(a) to impose a non-Guidelines sentence.*[38]

As for intended loss, the parties disputed whether the Court also applied that enhancement in computing defendant's Guidelines offense level. Defendant Wittig argued on appeal that the Statement of Reasons specifically found no intended loss under the Guidelines. The government pointed

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[35] *Wittig II*, 2006 WL 3378451, at *6 (emphasis added).

[36] *Id.*

[37] *Id.* (citation omitted).

[38] *Id.* (citation omitted) (emphasis added).

out that the Court had made such findings in its oral sentence pronounced at sentencing, and that should control over an inconsistent written sentence. *Wittig II* noted, however, that that rule only applies to the sentence, not the explanation for the sentence.[39]

The court then stated,

> In any event, the evidence before the district court would not support an intended-loss enhancement. In *Wittig I* we noted that Mr. Wittig's loan was collateralized and that to "ignore collateral in determining intended loss, the court must first determine that the defendant intended to deprive the lender of its collateral . . . . *The district court on remand made no finding of such an intent, there was no evidence that would support such a finding, and, indeed, we have been pointed to no evidence that Mr. Wittig intended the Bank to lose any money on its loan to him.*[40]

Thus, the court concluded, it was error for the Court to increase defendant Wittig's offense level above the base offense level of 6, and the Guidelines sentencing range of 0-6 months is well below his actual sentence of 60 months.[41]

2. Harmless Error

The court in *Wittig II* was unpersuaded by the government's argument that the sentence should be affirmed because other factors make it reasonable and this Court said that it would impose the same

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[39] *Id.*

[40] *Id.* (emphasis added).

[41] *Id.* at 7.

sentence even if the gross receipts and intended loss enhancements did not apply.[42]

First, the court stated that "the reasonableness of the imposed sentence is irrelevant to the harmless-error analysis."[43] This is because a defendant is harmed by a reasonable sentence if the court, absent the error, would have imposed a lesser, but still reasonable, sentence.[44] Second, the court distinguished this case from those cases where the Circuit relied on a district court's expression of an alternative sentence in determining whether a *Booker* error was harmless. "In those cases the district court had correctly calculated the Guidelines sentencing range. The question was only whether the district court, if it had known that it had discretion to vary from the Guidelines range, would have exercised that discretion."[45]

In this case, however, the government asked the court to assume that even if this Court had known that the sentence imposed was a "dramatic variance" from the highest possible Guidelines sentence, it would not have been influenced by that knowledge. The court flatly rejected that argument, stating: "We lack the government's confidence in that assumption."[46] First, the court stated that it could not presume that this Court would not have been influenced by knowing that the sentence being imposed was 10 times as long as the maximum under

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

the Guidelines.[47] Moreover, this Court failed to explain what "dramatic facts" justified "such an extreme divergence from the best estimate of Congress's conception of reasonableness expressed in the Guidelines."[48] Finally, the court directed this Court to "explain what the Guidelines failed to take into account and why that omitted factor is of such enormous consequence."[49]

The court proceeded to express doubt as to the relevance of the "considerations apparently relied upon" by this Court in imposing sentence.[50] Specifically, the court noted there is no evidence to support a finding that Wittig intended a loss to the bank, and any intent to inflict loss on Westar is too tenuous to justify a variance.[51] The court directed this Court to point to specific evidence regarding defendant Wittig's conviction in the Westar case to justify an increase.[52] Finally, the court stated that the government had failed to point it to evidence of the quid pro quo arrangement with Weidner regarding financing the rights purchase, noting an apparent inconsistency between the claim that Weidner need such an inducement and the claim that such an offering was extremely advantageous to defendant Wittig.[53]

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[47] *Id.*

[48] *Id.* (quoting *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006)).

[49] *Id.* (citing *United States v. Bishop*, 469 F.3d 896, 908-10 (10th Cir. 2006)).

[50] *Id.* at 8.

[51] *Id.*

[52] *Id.*

[53] *Id.*

II. Analysis

A. Objections to Presentence Report

The Court previously ruled on objections to the PSR prepared for the first resentencing on April 24, 2006. At the sentencing hearing, defendant Wittig renewed his objections to the PSR that were made prior to the first resentencing. The Court makes the following rulings on the renewed objections:

Government's Objection No. 1: obstruction of justice, ¶ 42

For the reasons set forth at the April 24, 2006, resentencing hearing, the Court overrules and denies this objection.

Government's Objection No. 2: alternative calculation for receipt of gross proceeds of $1 million or more is not mentioned in the PSR, ¶ 51

The Court previously sustained this objection, but pursuant to the Tenth Circuit's decision in *Wittig II*, as discussed below, will overrule and deny this objection at this time.

Defendant's Objection No. 1., enhancement for intended loss is incorrect, ¶ 51

The Court previously overruled this objection, but pursuant to the Tenth Circuit's decision in *Wittig II*, as discussed below, will sustain this objection at this time.

Defendant's Objection No. 2: enhancement for "proceeds" is incorrect, ¶ 52

The Court previously overruled this objection, but pursuant to the Tenth Circuit's decision in *Wittig II*,

as discussed below, will sustain this objection at this time.

Defendant's Objection No. 3: imposition of $1 million fine, ¶¶ 81-87

For the reasons set forth at the April 24, 2006, resentencing hearing, the Court overrules and denies this objection, and again imposes a fine of $1 million.[54]

Defendant's Objection No. 4: guideline range of 51 to 63 months, ¶ 91

The Court previously overruled this objection, but pursuant to the Tenth Circuit's decision in *Wittig II*, as discussed below, will sustain this objection at this time.

Defendant's Oral Objection: special condition of supervision, ¶ 105

At the February 5, 2007 sentencing hearing, defendant Wittig objected to the special condition of supervision that would prohibit him from being employed in any capacity in which he will have executive authority over a business, company or agency, or to engage in financial agreements or negotiations on behalf of any business, company or agency, without prior approval of the Court. Defendant Wittig argued that the Court lacks authority to impose this special condition.

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[54] The statutory maximum fine for a violation of 18 U.S.C. § 1005 is $1,000,000 and the Guidelines allow for the Court to impose a fine up to the statutory maximum fine. U.S.S.G. § 5E1.2(c)(4) (2001).

> The court may order, as a further condition of supervised release, to the extent that such condition—
>
> > (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
> >
> > (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
> >
> > (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);
>
> any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.[55]

Section 3563(b)(5) allows for a condition that the defendant

> refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.[56]

Defendant has now supplemented his objection in writing (Doc. 356) and argues that there is no

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[55] 18 U.S.C. § 3583(d).

[56] *See also* U.S.S.G. § 5F1.5.

reasonable nexus between this case and the condition set forth in paragraph 105 of the PSR.

The Court finds that these conditions of supervision are directly connected to the underlying offenses for which defendant Wittig was convicted. Defendant Wittig was convicted of fraud and conspiracy to commit fraud that involved financial transactions. Specifically, he was found guilty in a scheme that involved false and misleading statements made on financial documents. If defendant Wittig were to have executive authority, or conduct financial transactions on behalf of a business entity, he would be responsible for a multitude of financial documents. As a result, the conditions are reasonably related to the nature and circumstances of the offense and the history and characteristics of this defendant.[57]

Furthermore, the Court finds that these conditions do not involve a greater deprivation of liberty or property than is necessary. Defendant Wittig is not prohibited entirely from engaging in the activities set forth in paragraph 105; he simply must obtain permission from this Court before doing so. The Court overrules and denies this objection.

B. Advisory Guideline Range

In light of *Wittig II*, the new advisory guideline calculation is as follows:

Base Offense Level, § 2B1.1(a)	6
Amount of Loss, § 2B1.1(b)(1) (Intended loss)	0

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[57] *See* 18 U.S.C. § 3553(a); *United States v. Hopson*, No. 06-5012, 2006 WL 3095883, at *3 (10th Cir. Nov. 3, 2006).

Gross Receipts, § 2B1.1(b)(12)	0
Adjusted Offense Level	6
Total Offense Level	6

Prior to the last resentencing, the Court calculated the offense level by attributing 16 points under the intended loss guideline and 2 more points for gross receipts, for a total offense level of 24. With a Criminal History category of I, the advisory guideline range was 51-63 months. The Court resentenced Wittig to 60 months, a 900% increase from the applicable 6 month advisory guideline maximum sentence.

1. Law of the Case/Scope of Remand

The government all but disregards the decision in *Wittig II*, instead focusing its discussion on *Wittig I*. The government asserts a "law of the case" argument while seeming to suggest that the fact that *Wittig I* was published somehow controls the second, unpublished opinion.[58] As the government notes in its sentencing memorandum, an exception to the law of the case doctrine exists when controlling authority has subsequently made a contrary decision of the law applicable to such issues.[59] In this case, *Wittig II* specifically clarified that the Court misread *Wittig I* with respect to application of the gross receipts enhancement. *Wittig II* went even further, however, definitively stating that neither the gross receipts nor

[58] (Doc. 348 at 7-14.)

[59] *United States v. Monsisvais*, 946 F.2d 114, 117 (10th Cir. 1991).

intended loss enhancement applies. *Wittig II* clearly ruled that the applicable Guidelines range in this case is 0-6 months when it so stated. As noted in all Orders and Judgments, the fact that *Wittig II* is unpublished merely means it is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. Thus, it is controlling authority in this case.

As a general matter, resentencing on remand is done de novo.[60] Thus, when an appellate court vacates and remands for a defendant's resentencing, lower courts must allow the defendant any procedural rights afforded to him at sentencing in the first instance.[61] The appellate court may, however, limit district court discretion on remand pursuant to the mandate rule.[62] This rule requires the district court to exercise its discretion in conformity with the appellate court's remand.[63] Tenth Circuit case law requires that the appellate court be specific if it intends to limit a district court's discretion on remand for resentencing.[64] The Circuit has also held that district courts should depart from appellate court mandates only in cases of "exceptional circumstances," such as when a blatant error would

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[60] *United States v. Keifer*, 198 F.3d 798, 801 (10th Cir. 1999).

[61] *United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir. 1991) (referencing Fed. R. Crim. P. 32(a)(1)).

[62] *Id.*

[63] *United States v. Hicks*, 146 F.3d 1198, 1200 (10th Cir. 1998).

[64] *Compare United States v. Webb*, 98 F.3d 585, 587 (10th Cir. 1996) (panel gives direction to resentence defendant within range of 27 to 33 months) with *United States v. Davis*, 912 F.2d 1210, 1215 (10th Cir. 1990) (providing for general remand).

result in "serious injustice."[65] The mandate rule is closely related to the law of the case doctrine cited by the government. The law of the case doctrine requires that findings made at one point in litigation may not be contested at a later stage, except under limited circumstances.[66]

The Court disagrees with the government's suggestion that the panel in *Wittig II* ignored the law of the case and overruled the panel in *Wittig I*. Moreover, for purposes of resentencing, the *Wittig II* the [sic] mandate is clear—neither enhancement applies. Accordingly, since there are no justifiable enhancements, the base offense level is 6, with a Guideline sentencing range of 0-6 months.

The Court will briefly address the merits of the government's enhancement arguments.

2. Gross Receipts

As to the gross receipts enhancement, the *Wittig II* panel interpreted the *Wittig I* panel as foreclosing any application of the gross receipts guideline except to consider the gross receipt facts under § 3553(a) in imposing a non-Guideline sentence.

The government argues that the Court can still arrive at an enhancement under a gross receipts theory based on the two $500,000 increases in defendant Wittig's credit line in May and June 2001 and the $96,000 Wittig received in interest from Weidner. The government interprets *Wittig I* as ruling that evidence demonstrated that separate and apart from the nominee loan proceeds of $1.5 million, Wittig derived more than $1 million in gross receipts

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[65] *Webb*, 98 F.3d at 587.

[66] *Id.*

from a financial institution based on these other transactions. The government argues that key to this second resentencing is "the finding and ruling of Panel I that Wittig individually realized gross receipts of two draws from his line of credit, which had been increased to $6 million," as well as "in the form of interest payments from Weidner that he had obtained as part of the scheme."[67]

The government asserts that this Court did not address these additional gross receipts because it "obviously" believed that it was not necessary to do so, in reliance on guidance from *Wittig I* about using § 3553(a) to reach the same sentence on remand. The government contends that *Wittig I* declined to consider these individually received gross receipts, plus gross receipts of interest earned, because the Court did not rely upon it in the first sentencing. The government asserts that this Court "can correct this on resentencing."

Defendant responds that the two draws by Wittig from his line of credit, were unrelated to the nominee loan that formed the basis of the offense conduct and that they constituted normal bank activity. Wittig argues that under the language of the gross receipts enhancement, these transactions fail to constitute gross receipts because they were not derived *as a result of* the offense.

While it is true that *Wittig I* made factual findings regarding the line of credit increases and interest payments, it is quite a leap to state that the court found that these were "additional gross receipts." Indeed, *Wittig I* declined to specifically address these receipts that were individually received by Wittig and

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[67] (Doc. 348 at 11.)

distinct from the $1.5 million nominee loan proceeds, as set out in footnote 2 of that opinion.[68] *Wittig I* did discuss the significance of this evidence, but in the context of upholding defendant Wittig's conspiracy conviction:

> Another aspect of that change in terms agreement supports the government's contention that Mr. Wittig was involved in concealing the loan to Mr. Weidner. Although the April 27, 2001 loan proposal prepared by Ms. Gurney requested an increase in the line of credit from $3.5 million to $5 million, Mr. Wittig sought to modify the request by deleting the $5 million figure on the change in terms agreement and writing in $6 million. *The fact that Mr. Wittig sought and obtained two additional $500,000 line of credit increases shortly thereafter permits the inference that, in making the request for $6 million on April 27, Mr. Wittig sought to obtain $1.5 million for Mr. Weidner and $1 million for himself through one single line of credit increase and that he sought to do so without disclosing that part of the requested increase was for Mr. Weidner.*[69]

USSG § 2B1.1(b)(12) states:

> (Apply the greater) If—
>
> (A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

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[68] *Wittig I*, 437 F.3d 1023, 1047 n. 2 (10th Cir. 2006).

[69] *Id.* at 1035 (emphasis added).

(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

The government has failed to provide any evidence that these two subsequent draws were "the result of" the offense to make this enhancement viable. The language in *Wittig I* is not conclusive that the two increases in Wittig's credit line are the result of the offense, only that they were tied to the single line of credit increase in the terms of agreement. There is no evidence that this was tied to the nominee loan such that it was "a result of the offense." The Court declines to apply this enhancement to defendant Wittig's base offense level.

3. Intended Loss

The Circuit concluded that the evidence before this Court could not support an intended loss enhancement because the $1.5 million loan was collateralized and in order to ignore the collateral, this Court was required to find that defendant Wittig intended to deprive Capital City Bank of its collateral. The Circuit held that the Court failed to make this finding, and said that there was no evidence before the district court to support intended loss based on the nominee loan.

The government asserts that the Court can still find that defendant Wittig intended a loss of more than $1.6 million because the collateral for the loan was impaired and was obtained by fraud. The government interprets *Wittig I* to mean that if the Court "considered the extent of the available

collateral, it could use the deficiency of the collateral to find an 'intended loss.'"[70] As such, the government essentially maintains *Wittig II* misinterpreted *Wittig I* in holding that the district court could not enhance Wittig's offense level based on the fact that the loan was undercollateralized. At the hearing, the government admitted several documents and portions of transcripts as evidence in support of its argument.[71] The government points to banker Bob Kobbeman's affidavit that the line of credit had a $1.6 million collateral deficiency and that the Court should disregard any reparations made by Wittig after the fraudulent nominee loan was discovered.

Defendant maintains both that the loan was collateralized and that Wittig intended no loss to the bank. Defendant points to Trial Exhibits 5 through 7 as evidence of the collateral he provided to secure the loans. Further, Wittig's actions were consistent in demonstrating his desire to secure the obligations. Defendant points to Christy Gurney's testimony and complains that Kobbeman's affidavit is inconsistent with his trial testimony and is new non-trial evidence.

The Tenth Circuit ruled in both *Wittig I* and *Wittig II* that before it can ignore collateral in determining intended loss, the district court must first determine that the defendant intended to deprive the lender of its collateral. The Court notes that in *Wittig I*, the government chose not to argue in support of the Court's disregard of the collateral provided by

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[70] (Doc. 348 at 19.)

[71] Government's Exhibits 1 through 9 were entered over defendant's continuing objection as to relevance and completeness.

defendant Wittig, instead arguing only that the amount of loss determination is proper under the gross receipts approach.[72] The Circuit ruled in *Wittig II* that the Court on remand had made no finding of such an intent, that there was no evidence that would support such a finding, and that the government had pointed to no evidence that Wittig intended the Bank to lose any money on its loan to him.[73] The Court declines to read *Wittig I* as the government urges, that is, permitting this Court to adjust the offense level upward based on the under-collateralized loan extension. Certainly, *Wittig II* does not invite this result. The government offers nothing by way of new evidence that changes the appellate conclusion on this issue or warrants disregard of the clearly stated mandate.

C. Variance Factors under § 3553(a)

1. Law of the Case/Scope of Remand

The remand on the variance issues was not as specific as it was on the Guidelines issues. The language of *Wittig II* certainly invites this Court on remand to make a § 3553 variance analysis, with the provision that this time, any such variance should be tied to the correct Guideline sentence of 0-6 months. Moreover, the court in *Wittig II* urged this Court to explain what "dramatic facts" justified "such an extreme divergence from the best estimate of Congress's conception of reasonableness expressed in the Guidelines"[74] as well as "what the Guidelines

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[72] *Wittig I*, 437 F.3d at 1048.

[73] *Wittig II*, No. 06-3166, 2006 WL 3378451, at *6 (10th Cir. Nov. 22, 2006)

[74] *Id.* (quoting *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006)).

failed to take into account and why that omitted factor is of such enormous consequence."[75] The court also questioned the relevance of several factors relied on by the Court in its first resentencing. This language, however, does not appear to limit this Court's discretion, but explicitly advises it to consider the statutory factors in determining a variance. The fact that *Wittig II* invites this Court to explain what facts justify any divergence from the Guideline sentence should not lead to the conclusion that the appellate court foreclosed a variance sentence, as long as it comports with the parameters set out by *Wittig II*.

2. Variance Analysis—Recent Circuit Decisions

After defendant was sentenced the first time, the Supreme Court decided *United States v. Booker*.[76] In two separate majority opinions, the Court decided first, that the mandatory nature of the Guidelines violates the Sixth Amendment.[77] Second, the Court decided that the appropriate remedy for this constitutional infirmity is to excise the provision from the Sentencing Reform Act that requires district courts to apply the Guidelines.[78] Instead, the Court deemed the Guidelines advisory and explained that sentencing courts must now consider them along with

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[75] *Id.* (citing *United States v. Bishop*, 471 F.3d 1162, 2006 WL 3237027, at *10 (10th Cir. Nov. 9, 2006)).

[76] 543 U.S. 220 (2005).

[77] *Id.* at 224-25 (Stevens, J.).

[78] *Id.* at 245, 259 (Breyer, J.).

the sentencing goals set forth in 18 U.S.C. § 3553(a).[79]

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[79] *Id.* at 259. These factors include:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
>
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated

The applicable standard of review under the new sentencing landscape is the reasonableness of the sentence.[80] The Tenth Circuit has since adopted the rule that a sentence within the advisory guideline range is entitled to a presumption of reasonableness.[81] The reasonableness inquiry has been even further developed by the Tenth Circuit since the time of defendant's last re-sentencing on April 24, 2006.[82]

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by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

[80] *Booker*, 543 U.S. at 261.

[81] *United States v. Kristl*, 437 F.3d 1050, 1054-55 (10th Cir. 2006). The United States Supreme Court recently granted a petition for writ of certiorari to consider whether it is consistent with *Booker* to accord a presumption of reasonableness to within-Guidelines sentences. *Rita v. United States*, 127 S.Ct. 551 (Nov. 3, 2006).

[82] As such, this Court obviously did not have the benefit of relying on more recent Tenth Circuit decisions such as *United*

As an initial matter, the Court finds it necessary to set forth its understanding of the Tenth Circuit's reasonableness inquiry, as set forth in recent opinions.[83] In *United States v. Cage*,[84] the court addressed for the first time what causes a sentence below the recommended guidelines range to be unreasonable.[85] The court explained that although the Guidelines are only one of the factors listed in § 3553(a), they are "an expression of popular political will about sentencing that is entitled to due consideration when we determine reasonableness."[86] The court went on to evaluate the discrepancy between the bottom of the properly calculated guideline range in that case, which was 46 months, and the sentence actually imposed, which was six days. The court deemed this discrepancy "both extraordinary and unreasonable for crimes of this level."[87] The court went on to explain:

> Because this case presents such an *extreme* divergence from the best estimate of Congress's conception of reasonableness expressed in the Guidelines, it should be considered reasonable only under *dramatic facts*. Had the comparative

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States v. Bishop, 469 F.3d 896 (10th Cir. Nov. 9, 2006). *See Wittig II*, 2006 WL 3378451, at *7 (10th Cir. Nov. 22, 2006).

[83] The Court notes that the United States Supreme Court also recently granted a petition for writ of certiorari to consider whether it is consistent with *Booker* to require that a sentence that constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances. *Claiborne v. United States*, 127 S.Ct. 551 (Nov. 3, 2006).

[84] 451 F.3d 585 (10th Cir. 2006).

[85] *Id.* at 591.

[86] *Id.* at 593.

[87] *Id.* at 594.

> difference been smaller but still outside the guidelines range, the district court's decision would not have been presumptively reasonable but an appropriate justification would suffice for this court to determine that it is reasonable. However, where as here, a district court effectively ignores the advice of the Guidelines that the crimes of conspiracy to distribute methamphetamine and using a telephone to facilitate drug trafficking merit a substantial term in prison, we should only treat the actual sentence as being a reasonable application of § 3553(a) factors if the facts of the case are dramatic enough to justify such a divergence from the politically-derived guideline range.[88]

After considering the district court's reasons for imposing such a divergence from the guideline sentence, the court concluded the district court erred in placing so much weight on factors such as the defendant's avoidance of drug use, minimal criminal history, and single motherhood status, which were not particularly uncommon factors.[89] The court held that such an extreme variance would have to be justified by § 3553(a) factors that are particular and individualized to the defendant.[90] As a result, the court held that these facts were not "dramatic enough to warrant such an extreme downward variance" and reversed and remanded for resentencing.[91]

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[88] *Id.* at 594-95 (footnote omitted) (emphasis added).

[89] *Id.* at 596.

[90] *Id.*; *see also United States v. Bishop*, 469 F.3d 896, 906 (10th Cir. 2006) (construing *Cage*).

[91] *Id.*

On November 9, 2006, the Tenth Circuit filed two opinions that affirmed upward variances by applying *Cage*.[92] In *United States v. Bishop*, the court explained that, in fashioning a sentence that varies from the Guidelines, the Tenth Circuit will look at whether it has some connection to the "guideposts created by the Sentencing Commission (such as criminal history points, offense characteristics, offense levels, etc.), [or] . . . another reasonable methodology in calculating the sentence. . . .[I]f a sentence that varies from the advisory Guidelines range is nevertheless tethered to the Guidelines themselves, we will likely consider this a reasonable methodology." [93]

In both *Bishop* and *United States v. Valtierra-Rojas*, the Circuit explained that the degree of compelling justification for a variance under the statute is proportional to the degree of difference between the advisory range and the sentence imposed.[94] In other words, the court has established a sliding scale of magnitude of the divergence from the Guidelines and justification for doing so. In so ruling, the court advises that district courts are to look at both the percentage of the divergence from the advisory guideline range and the amount of months above or below the guideline range. Under this sliding scale analysis, the court has now evaluated three cases where an upward variance was upheld: (1) *Bishop*, where a divergence from the defendant's 57 month maximum guideline

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[92] *Bishop*, 469 F.3d at 906; *United States v. Valtierra-Rojas*, 468 F.3d 1235 (10th Cir. 2006).

[93] *Bishop*, 469 F.3d at 907.

[94] *Id* at 908; *Valtierra-Rojas*, 468 F.3d at 1239.

sentence to 78 months (37%) was found to be a "significant increase" requiring "sufficient explanation and justification,"[95] (2) *Valtierra-Rojas*, where a divergence from the defendant's 27 month maximum guideline sentence to 60 months (122%) was found to be "substantial" and required "compelling reasons" to support the variance,[96] and (3) *United States v. Mateo*,[97] where a divergence from the defendant's maximum guideline sentence of 21 months to 120 months (471%) was found to be "extreme," like the sentence in Cage, and required a "'compelling' justification support by 'dramatic facts.'"[98]

In *Mateo*, the court expanded on its discussion in *Bishop* about the use of the Guidelines as a proper guidepost in determining an appropriate sentence under the § 3553(a) factors. The district court in *Mateo* had compared the defendant's criminal history to that of an "armed career criminal," yet did not find the armed career criminal guideline to be applicable. Instead, the court sought guidance from the armed career criminal statute in fashioning a sentence. The Tenth Circuit held:

> We cannot agree with Mr. Mateo's claim that the District Court's reference to the armed career criminal statute is inappropriate when considering what sentence to impose. It is clear that the District Court did not apply the armed career criminal provision to Mr. Mateo because the minimum sentence applicable for such an

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[95] *Bishop*, 469 F.3d at 908-10.

[96] *Valtierra-Rojas*, 468 F.3d at 1240-42.

[97] 471 F.3d 1162 (10th Cir. 2006).

[98] *Id.* at 1170.

> offender is 15 years' (or 180 months') incarceration. Rather, the sentencing transcript indicates that the court sought guidance from the armed career criminal provision as to the appropriate length of incarceration given Mr. Mateo's criminal history as disclosed by the unchallenged facts in the PSR. The Guidelines are clearly relevant when determining an appropriate sentence, and in this case, the District Court's reference to the Guidelines in searching for a guidepost is not error.[99]

Judge Murphy wrote a concurrence to the *Mateo* decision and was joined by Judge Kelly.[100] Although Judge Murphy and Judge Kelly agreed that the sentence imposed by the district court should be upheld as reasonable, they "question this court's developing insistence that district courts take extraordinary steps to justify sentences outside the range set out in the advisory Sentencing Guidelines."[101] The concurrence points to the institutional advantage that district courts have in imposing sentences based on their exposure to numerous defendants. The concurrence goes further and maintains that this new method for imposing variance sentences

> would appear to be an attempt to force the district courts to hew as close to the Guidelines range as possible. It is odd, indeed to see how quickly the appellate standard of reasonableness set out in *Booker* has morphed into a mathematical exercise pegged exclusively to

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[99] *Id.* at 1168-69.

[100] *Id.* at 1171 (Murphy, J., concurring).

[101] *Id.*

> those sentencing factors in § 3553(a) relating to the advisory Guidelines.
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> . . . .
>
> Although many might bemoan the decision in *Booker*, it is the law of the land. The Guidelines are no longer mandatory and it is improper for this court to impose a s stem of appellate review that seeks to return this circuit, *de facto*, to a mandatory system.[102]

Judge Murphy also wrote a an [sic] order dissenting from the Tenth Circuit's denial of en banc review, and was joined by Judge Kelly and Judge Briscoe in *United States v. Atencio*.[103] There, a three-judge panel imposed another procedural requirement on district courts: they must now provide pre-hearing notice under Fed. R. Crim. P. 32(h) and identify each ground the district court is considering in support of a variance sentence. [104] The dissent to the order denying en banc review wrote to express concern that the procedural limitations expressed in the *Atencio* decision are "inconsistent with the post-*Booker* scheme; [and] occasions a significant, untoward burden on the district courts in this Circuit."[105]

Having determined that defendant's advisory guidelines range is 0 to 6 months, this Court now turns to a variance analysis, keeping in mind the

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[102] *Id.* at 1172-73.

[103] —F.3d—, 2007 WL 102977, at *1 (10th Cir. Jan. 17, 2007) (Murphy, J., dissenting to order den. en banc review).

[104] *Id.* at *8; *see* Part III *infra*.

[105] *Id.* at *2 (Murphy, J., dissenting to order den. en banc review).

framework of review in this circuit, as described above. In *Wittig II*, the Tenth Circuit found that this Court's prior sentence of 60 months was an "extreme" divergence from the advisory guideline maximum 6 month sentence and that this Court had failed to articulate "dramatic facts" that justified "such an extreme divergence from the best estimate of Congress's conception of reasonableness expressed in the Guidelines."[106] The court went on to advise this Court that it needed to explain what facts the guideline range failed to take into account and why such omission justifies the extreme variance. Because the Court now finds that the Guidelines do fail to take dramatic facts into account with regard to this defendant, it will now turn to a discussion of those dramatic facts within the framework of the factors set forth in § 3553(a).

3. The Variance Factors

The Court now sets forth a justification for its decision to vary from the guideline range and impose a sentence of 24 months. This variance represents an 18 month and 300% disparity from the maximum Guideline sentence of 6 months. Based on the findings made in *Wittig II* and the Tenth Circuit's decisions regarding the sliding scale review of variance sentences, the Court will justify its decision with dramatic facts that it finds warrants this "extreme" disparity.[107] In so doing, the Court focuses

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[106] *Wittig II*, No. 06-3166, 2006 WL 3378451, at *7 (10th Cir. Nov. 22, 2006) (quoting *Cage*, 451 F.3d at 594.)

[107] The Court notes that this range falls between the 471% discrepancy the Tenth Circuit has found to be "extreme" and the 122% discrepancy the Court has found to be "substantial." Compare *Mateo*, 471 F.3d at 1170 *with United States v. Valtierra-Rojas*, 468 F.3d 1235, 1240 (10th Cir. 2006). Although

on facts particular to this defendant and determines that a term of imprisonment of 24 months is sufficient, but not greater than necessary to comply with the purposes set forth in the statute.

- **§ 3553(a)(1)—Nature and circumstances of the offense and the history and characteristics of the defendant; § 3553(a)(2)(A)—Need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.**

The Court finds that the Guidelines do not adequately account for the nature and circumstances of this offense, or the seriousness of the offense, as they foreclose any recognition that defendant received a benefit from the fraud he was convicted of. The Court notes that it is extremely unusual for a defendant to have a money laundering conviction without the amount of laundered funds used to determine the offense level. As a result, the Guidelines do not provide for an appropriate incremental punishment to account for this defendant's involvement in a scheme that resulted in a secret transfer of $1.5 million to a bank employee, after signing false and misleading documents. Both appellate panels have made clear that this Court may still consider the facts relevant to the gross receipts

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there is a chance that the Circuit will characterize this discrepancy as substantial, requiring only "compelling" facts to justify it; as opposed to extreme, requiring "dramatic" facts, the Court nonetheless proceeds to analyze this as an extreme variance, explaining that the following facts, when taken together, are dramatic and justify an eighteen month, 300% upward variance.

enhancement analysis under § 3553(a). Indeed, the Circuit has determined that the language and application of the gross receipts enhancement is ambiguous and therefore must give way to defendant's interpretation of the enhancement under a straight Guideline analysis.[108]

But the Court now considers these gross receipts facts with regard to the nature and circumstances of the offense and finds that they warrant a variance, using the general fraud Guideline provision as a guidepost in determining the magnitude of that variance. The Court takes this opportunity to stress that it does not rely upon any facts related to the Westar case that was tried after defendant's initial sentencing and before his first resentencing.[109]

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[108] *See supra* notes 5–6, 35–36.

[109] The government makes much of *Wittig I*'s discussion of the government's evidence of a quid quo pro theory that defendant Wittig was making the loan of $1.5 million to curry favor with Weidner to support a $20 million loan package for Wittig and others to purchase stock in a new company formed from assets of the utility. While *Wittig I* discounted the importance of motive evidence in respect to the underlying convictions, it did concede that the evidence was of some relevance:

> The evidence of the lucrative benefits from the new utility company was of some relevance: it did indicate that Mr. Wittig had an interest in cultivating a good relationship with Mr. Weidner. The evidence invoked by Mr. Wittig does not foreclose the government's allegation that Mr. Wittig sought to cultivate Mr. Weidner's good will and that one way of obtaining that good will was to loan Mr. Weidner the $1.5 million. Moreover, Mr. Wittig has not established the necessary prejudice to warrant reversal of his conviction.

Wittig I, 437 F.3d 1023, 1043 (10th Cir. 2006) (footnote omitted).

The *Wittig I* panel upheld Wittig's convictions in this case for bank fraud and conspiracy to commit bank fraud.[110] In so doing, the Tenth Circuit affirmed Wittig's conviction under a *Pinkerton* conspiracy theory, which necessarily recognizes that he can be held liable for the reasonably foreseeable acts of co-defendant Weidner.[111] Likewise, the Guidelines recognize that defendants should be sentenced based on all relevant conduct.[112] Although the Court is foreclosed from considering intended loss with regard to Wittig, the Court need not ignore that Wittig intended to profit from the fraudulent scheme. Wittig is the one who initially acquired the fraudulent loan and he signed false documents with regard to that loan. Whether or not he intended to deprive the Bank of funds, he did intend to profit from the fraudulent conspiracy with co-defendant Weidner. These facts are what led to his conviction, which has been affirmed.

The fraud Guidelines recognize that fraud involving a financial institution requires an enhanced penalty.[113] Here, although the Guideline does not

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In *Wittig II*, however, the court discussed the government's quid pro quo theory in the context of its relevance as a § 3553(a) variance factor. The court stated that although the Court said there was evidence that Wittig's accommodation to Weidner was part of a quid pro quo arrangement in which the Bank would later loan Wittig and others sums necessary to exercise rights to purchase Westar stock, the government failed to point the court to that evidence. As the Court stated, it does not rely upon any facts related to the Westar case in imposing a variance.

[110] *Wittig I*, 437 F.3d at 1032-45.

[111] *See id.* at 1038-39.

[112] U.S.S.G. § 1B1.3 (2001).

[113] *Id.* § 2B1.2(b)(12).

apply because the gross receipts from the nominee loan was attributed to co-defendant Weidner, the Court has previously found that this defendant retained separate and individual uses of these gross receipts. Specifically, the Court found that Wittig used the $1.5 million increase in his line of credit at the Bank so that he could increase his lending power at the institution and that he was then able to draw from that increase for other purposes. Wittig also used these proceeds as a personal investment, earning interest on the loan to Weidner in an amount greater than the interest he was paying on the line of credit at the bank. Without Wittig's participation, this scheme could not have been executed. The Court doubts the Sentencing Commission intended to ignore such participation and such levels of proceeds when fashioning the fraud guidelines. If these proceeds had been attributed to him under the Guidelines, defendant Wittig would have received a 24 offense level under a gross receipts analysis, resulting in a 51-63 month guideline range. The Court finds, however that a more reasonable guidepost for determining the degree of the variance can be found in the loss table for fraud, which does provide for incremental punishment. For a $1.5 million loss, the table provides for a 16-level increase in offense level, which would result in a total offense level of 22. This offense level, along with a Criminal History Category of I, renders an advisory guideline range of 41-51 months. The Court neither applies the intended loss, nor the gross receipt enhancements, but believes that they express the intent of Congress that defendants involved in a fraudulent scheme that involves a financial institution should receive a greater penalty. The Guidelines, along with Wittig's relevant conduct convinces this Court that an

extreme variance is warranted from the maximum Guidelines sentence of six months.

The Court finds that the Guidelines themselves provide some instruction on Congress's "conception of reasonableness" under these circumstances. This Court attempts to tether its sentence to the Guidelines, albeit finding a lower term of custody of 24 months is sufficient, but not greater than necessary to comply with the purposes set forth in the statutory factors.

- **§ 3553(a)(6)—Need to avoid unwarranted sentence disparities among the defendants with similar records who have been found guilty of similar conduct.**

Under § 3553(a)(6), a district court must consider whether the sentence will create "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." "While similar offenders engaged in similar conduct should be sentenced equivalently, disparate sentences are allowed where the disparity is explicable by the facts on the record."[114] A sentence of 41-51 months represents a Guideline range that would be applicable to *any* defendant who was convicted at trial of a fraud scheme involving $1.5 million, who received no other enhancements and had a criminal history category of I.

The Court also considers the disparity between defendant Wittig and co-defendant Weidner's sentences. Ordinarily, the disparity between co-

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[114] *United States v. Shaw*, 471 F.3d 1136, 1140 (10th Cir. 2006) (quoting *United States v. Goddard*, 929 F.2d 546, 550 (10th Cir. 1991)) (citation omitted).

defendants' sentences is not grounds for relief.[115] But, as the Tenth Circuit recently explained, "where the court concludes that the Guidelines inadequately reflect a defendant's criminal history or the seriousness of the offense, a deviation may be appropriate."[116]

In this case, defendants' respective criminal histories are the same. Both defendants were convicted of the same crimes—conspiracy and bank fraud. Indeed, the Tenth Circuit specifically rejected Wittig's argument that a bank customer could not be prosecuted for bank fraud, holding that a bank customer may be convicted of bank fraud if he conspires with a bank official or aids and abets the official's violation of the statute.[117] Defendants' conduct was jointly undertaken, and defendant Wittig knew what co-defendant Weidner intended to do with the money. Both defendants filed documents with the Bank that failed to disclose the $1.5 million loan between them.[118] Defendant Wittig was not merely a customer doing a favor for a bank officer—he purposely made a profit from what he knew was a fraudulent loan transaction in the form of a bank loan that he acquired then passed on to co-defendant Weidner. As previously discussed, defendant Wittig and co-defendant Weidner each used the $1.5 million from the line of credit increase in different ways and derived some benefit from it. Given these substantial similarities, the advisory Guideline range of 0-6 months for defendant Wittig does not properly

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[115] *United States v. Davis*, 437 F.3d 989, 997 (10th Cir. 2006).

[116] *Shaw*, 471 F.3d at 1141.

[117] *Wittig I*, 437 F.3d at 1038.

[118] *Id.* at 1028-29.

account for all of the § 3553(a) factors relevant to his sentencing decision, in particular § 3553(a)(2)(A), which authorizes a nonguideline sentence if the guideline range does not adequately reflect the seriousness of the offense. No explication of the facts could justify sentencing defendant Wittig under a sentence that in essence treats his culpability like a misdemeanor when, but for his collaboration and conduct that mirrored that of co-defendant Weidner, the crimes of conviction could not have been committed. The Court finds that these are dramatic facts warranting an extreme variance from the Guideline range.

That being said, the Court also recognizes and accounts for the dissimilarities of the defendants, including the fact that co-defendant Weidner was a fiduciary of the Bank and that Weidner received an obstruction enhancement for giving false testimony at his sentencing hearing. The Court also heeds the Tenth Circuit's recent ruling foreclosing the attribution of intended loss to defendant Wittig. Because the Circuit clearly found that there was no evidence that defendant Wittig intended any loss to the Bank, his culpability is less than co-defendant Weidner, and thus some degree of disparity is warranted. Co-defendant Weidner's sentence of 60 months reflects these differences, as it is two and one-half times as long as the sentence the Court seeks to impose on defendant Wittig.

In so ruling, the Court notes that, in its view, the disparity factor warrants a variance far closer to the 60-month sentence imposed on co-defendant Weidner. Given the state of the law in this Circuit, however, the Court finds the degree of variance that

can be justified under these dramatic facts is limited to 24 months.

As the Tenth Circuit recently explained in a case involving application of § 3553(a)(6), "[w]hile an adjustment based on a factor that was already built into the guideline calculation may challenge the overall uniformity of sentences under § 3553(a)(6), any tension between subsection (a)(2)(A) and subsection (a)(6) can be resolved by the district court in light of all the facts before it, as long as it does so reasonably."[119] For the reasons set forth above, defendant Wittig's Guideline calculation underestimates his culpability and creates unwarranted sentencing disparities, which the Court considers a dramatic fact justifying an extreme divergence from the Guideline range.[120] The Court gives significant weight to this statutory factor when determining the magnitude of its variance from the guideline range.

- **§ 3553(a)(2)(B)—Need for the sentence imposed to afford adequate deterrence to criminal conduct.**

Finally, the Court notes that the Guideline sentence suggests that both this defendant and other defendants can avoid the consequences of bank fraud by structuring their transactions in a manner similar to this case. A variance is necessary to afford adequate deterrence to bank customers who are aiders and abettors to nominee loans with bank

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[119] *Shaw*, 471 F.3d at 1141 (*citing United States v. Cage*, 451 F.3d 585, 595 (10th Cir. 2006) ("The problem with the sentencing decision, however, is not in the consideration of these factors; it is in the weight the district court placed on them.")).

[120] *Cage*, 451 F.3d at 595.

officers because, but for the customer, the bank officer could not structure the fraudulent transaction.

The Court further notes that defendant Wittig has never acknowledged any responsibility for any of the conduct for which he has been convicted. This has required the government to continually meet its burden of proof despite several instances that demonstrate overwhelming evidence of guilt.[121] Furthermore, while on appeal bond, defendant Wittig transferred financial assets in a manner that was in direct violation of an Order of this Court in both this and the Westar case. However, the Court also notes that defendant Wittig has lived a significant portion of his life without incurring any other criminal convictions. Although defendant's overall conduct could justify a higher sentence, the Court believes that 24 months should afford adequate deterrence and protect the public from further crimes of defendant. The Court gives significant weight to this statutory factor in fashioning this variance sentence.

In sum, the Court has considered the factors set forth in § 3553(a) and determined that a variance from the advisory Guidelines range of 0-6 months is warranted. Although the fraud enhancements for

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[121] At the sentencing hearing, defendant compared his sentence with that of a bank officer convicted of bank fraud, for whom this Court recently imposed a 12 month sentence. Similarly, defendant suggested that upward variances are rare in fraud cases in this district. Of course, the individualized and particular application of variance factors does not lend itself to comparison of defendants who committed *different* crimes. One of many differences defendant ignores in making such arguments is that many, in fact, most of the defendants convicted of fraud in this district, pleaded guilty; and their sentences reflect the mitigating factor of acceptance of responsibility.

intended loss and gross receipts are not applicable under a Guidelines analysis, the Court finds them instructive in determining a variance sentence based on the nature and circumstances and seriousness of the offense. The Court additionally gives significant weight to the need to avoid unwarranted disparities in sentencing and to afford adequate deterrence to criminal conduct.

The factors this court relies upon in determining a variance are not commonplace, but instead particular to defendant Wittig. Indeed, the very lack of on-point case law referenced in *Wittig I* is a sign of how sufficiently uncommon these facts are that justify a divergence from the presumptively reasonable Guidelines sentence. The Court, given the complex new landscape for sentencing in this Circuit, has done its best to fashion a sentence for this defendant that both attempts to honor Congress's intent in passing sentencing laws, and to recognize the other sentencing factors set forth in § 3553(a). In so doing, it has primarily relied upon the Tenth Circuit's guidance that "[t]he Guidelines are clearly relevant when determining an appropriate sentence" under the variance factors.[122]

After due consideration to all relevant facts related to the nature and circumstances of the offense, the Court finds that compelling and extreme facts

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[122] *United States v. Mateo*, 471 F.3d, 1162, 1169 (10th Cir. 2006) (citing *United States v. Wolfe*, 435 F.3d 1289, 1304 n.12 (10th Cir. 2006) (analogizing to other Guidelines is the primary method of determining the reasonableness of a departure) (internal quotation omitted)); *see also United States v. Bishop*, 469 F.3d 896, 910 (10th Cir. 2006) (upholding upward variance based on the fact that "the court used the advisory Guidelines as a tool for fashioning a reasonable sentence").

warrant a sentence of 24 months and that this sentence is sufficient, but not greater than necessary to comply with the Guidelines, the need for the sentence imposed to deter criminal conduct, and the need to avoid an unwarranted disparity of sentences between defendants with similar records and between this defendant and co-defendant Weider.

III. Notice

On January 16, 2007, the Court notified the parties pursuant to Fed. R. Crim. P. 32(h) that it was contemplating imposing a non-guideline sentence in this matter pursuant to the factors set forth in 18 U.S.C. § 3553(a)(1)-(6). That same date, unbeknownst to the Court, the government filed its Sentencing Memorandum (Doc. 348), advocating a non-guideline sentence of 60 months.

On January 17, 2007, one day after this Court filed its Notice, the Tenth Circuit issued a decision for publication in *United States v. Atencio*,[123] for the first time holding that a district court must provide notice of its intent to vary from an advisory guideline range and "its contemplated reasons" for doing so under Fed. R. Crim. P. 32(h).[124] The Tenth Circuit in *Atencio* reversed, in part, because neither the Presentence Investigation Report ("PSR") nor the district court identified the grounds upon which the upward variance was imposed in advance.[125]

Defendant Wittig then filed a Motion for Legally Sufficient Rule 32 Notice (Doc. 351), requesting that the Court set forth the grounds it was considering

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[123] —F.3d—, 2007 WL 102977 (10th Cir. Jan. 17, 2007).

[124] *Id.* at *8.

[125] *Id.*

that may warrant imposition of a sentencing variance, in light of the court's decision in *Atencio*. The Court granted defendant's motion on January 23, 2007, but noted that the supplementation was being given out of an abundance of caution, as it was not the Court's intent to rely on a ground not specified in its original Notice, in the PSR, or in the government's prehearing submission.

Defendant filed a Supplemental Motion for Additional Rule 32 Notice on January 24, 2007—two days before filing its Sentencing Memorandum (Doc. 354). In his motion, defendant argues that this Court's January 23rd supplemental notice was insufficient under the standards enunciated in *Atencio*. Specifically, defendant argued in this motion that the PSR does not provide appropriate notice of any basis for variance because it is based on a faulty Guidelines calculation, that the notice was not specific enough in its reference to facts involved in the "Westar fraud trial," and asked the Court to clarify its statement concerning how mitigating factors or argument provided in defendant's sentencing memorandum could necessitate another round of supplemental notice and briefing.[126]

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[126] The Court notes that it does not rely on any evidence regarding the Westar fraud trial in imposing its variance sentence. The Court further notes that its reference in the previous supplemental notice to the possible need for further notice about *mitigating* factors was quite straightforward: had defendant presented the Court with mitigating factors in his sentencing memorandum that it was considering relying upon for a *downward* variance, it would require further notice under the holding in *Atencio*. Based on this Court's tentative sentence, this is not the case.

After the Court announced its tentative sentence, in keeping with the practice of this and most federal courts,[127] the Court found that notice of the exact grounds upon which this Court intends to vary had now been provided. *Atencio* provides the following procedure for a defendant if he wishes to object to the lack of notice in imposing a variance:

> Upon objecting to the lack of notice, the defendant should then move for a continuance. We will generally assume that a reasonable continuance cures Rule 32(h) error, rendering it harmless by allowing parties adequate time to prepare to contest or support the variance just as they could have, had they received notice prior to the sentencing hearing. This procedure both promotes the "focused, adversarial resolution of the legal and factual [sentencing] issues" contemplated by *Burns*, and avoids inefficient appellate litigation by permitting the court below to cure its error.[128]

Therefore, defendant has the option of either waiving any objection to Rule 32(h) notice, to the extent that he argues a deficiency still exists, or move for a continuance to allow for additional briefing on the variance grounds announced herein.

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[127] *See* Fed. R. Civ. 32(i) (outlining the sentencing procedure which requires the Court to provide the defendant an opportunity to produce evidence and argue objections to the presentence report or any other controverted matter before the Court imposes sentence).

[128] *Atencio*, 2007 WL 102977, at *9 (quoting *United States v. Burns*, 501 U.S. 129, 137 (1991)).

In light of the Court's variance ruling, defendant waived any such objection to Rule 32(h) notice. The government also waived any objection it might have.

IT IS THEREFORE ORDERED BY THE COURT that defendant David C. Wittig is hereby sentenced to a term of imprisonment of 24 months, for all of the reasons set forth in this written order.

IT IS SO ORDERED.

Dated this 8th day of February 2007.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed November 22, 2006]

No. 06-3166
(D. Kansas)
(D.C. No. 02-CR-40140-JAR)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID C. WITTIG,
Defendant-Appellant.

ORDER AND JUDGMENT *

Before **HARTZ, McWILLIAMS** and **McCONNELL**, Circuit Judges.

This is David C. Wittig's second appeal of his convictions on six charges arising out of a fraudulent bank transaction. On the first appeal we reversed his sentence because of errors in computing his offense level under the United States Sentencing

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Guidelines (USSG). *See United States v. Weidner and Wittig*, 437 F.3d 1023 (10th Cir. 2006) (*Wittig I*). We remanded for resentencing, noting that the intervening Supreme Court decision in *United States v. Booker*, 543 U.S. 220 (2005), had held that the Guidelines are not mandatory so that the district court should consider whether the sentencing factors set forth in 18 U.S.C. § 3553(a) would require a non-Guidelines sentence. *See Wittig*, 437 F.3d at 1047. The district court on remand imposed a higher sentence than before, and Mr. Wittig appeals. We reverse again because of errors in calculating the Guidelines offense level, errors that, in our view, were not harmless.

I. BACKGROUND

Mr. Wittig's offense occurred in 2001 when he was the chairman of the board, president, and chief executive officer of Westar Energy, Inc. (formerly Western Resources, Inc.), the largest electric utility company in Kansas. Mr. Wittig had substantial assets (a March 2001 financial statement reported a net worth of over $33 million) and had been a customer of Capital City Bank for several years. In 1998 he had borrowed $700,000 from the Bank to purchase a home, and two years later he had obtained a $1 million line of credit to renovate it. By 2001 his line of credit at the Bank had increased to $3.5 million.

Clinton Odell Weidner II was president, chief executive officer, and general counsel of the Bank. In early 2001 a bank customer inquired whether he knew anyone interested in investing in a real estate project in Arizona (the Project). The investment required $1.5 million. Mr. Weidner asked Mr. Wittig whether he was interested. Mr. Wittig declined,

saying that he was focusing his investment efforts on Westar. Mr. Weidner then decided that he would pursue the Arizona opportunity himself. Because he did not have the required $1.5 million, and because the Bank's policies forbade such a large loan to an employee, Mr. Weidner approached Mr. Wittig about a loan.

Shortly thereafter, Mr. Weidner prepared a proposal to increase Mr. Wittig's line of credit from $3.5 million to $5 million. On the proposal he stated that Mr. Wittig would use the increase to fund renovations on his home, purchase stock, and make business investments. After the Bank's owner approved the proposal, Mr. Wittig and his wife signed a "Change In Terms Agreement" which included a provision setting the annual interest rate at 5.39%. It also stated that the Wittigs' line of credit was being increased to $5 million, but Mr. Wittig crossed out the $5 million and wrote in $6 million. On April 30, 2001, he faxed the signed agreement to Mr. Weidner, $1.5 million was posted to his account, and the same amount was posted as a withdrawal and sent to an Arizona title company as Mr. Weidner's investment in the Project. The next day Mr. Weidner executed a promissory note to Mr. Wittig for $1.5 million at an annual interest rate of 7%. Both men failed to disclose this loan in various documents filed with the Bank. During the next year Mr. Weidner paid Mr. Wittig $97,000 on the loan.

After Bank officers discovered the improper loan in late 2001, a friend of Mr. Weidner's forwarded funds to Mr. Weidner's Arizona Project partner, who transferred the funds to Mr. Wittig's Bank account. Mr. Wittig then paid down his line of credit at the Bank by $1.6 million. When Mr. Weidner resigned

from the Bank in April 2002, Mr. Wittig was asked to increase the collateral for his line of credit by pledging additional Westar stock, increasing the mortgage on his home, and assigning life-insurance benefits. Mr. Wittig complied with the request. He paid off his line of credit three months later.

An indictment charged Mr. Wittig and Mr. Weidner with one count of conspiracy to submit false entries to a federally insured bank and to launder money (by investing the loan proceeds), *see* 18 U.S.C. § 371; four counts of making a false bank entry, *see* 18 U.S.C. § 1005; and one count of money laundering, *see* 18 U.S.C. § 1957. Mr. Wittig was found guilty on all six counts after a jury trial in the United States District Court for the District of Kansas.

At sentencing, the district court determined that under the 2002 version of the Sentencing Guidelines Mr. Wittig's base offense level was 6. The district court then enhanced his offense level under two Guidelines provisions. Section 2B1.1(b)(1) increases the offense level for large pecuniary losses associated with economic offenses. The loss can be actual or merely intended. *See id.* cmt. 2(A). The court found that Mr. Wittig and Mr. Weidner each intended a loss of $1.5 million to the Bank. It found that although there was no actual loss to the Bank, Mr. Wittig could have reasonably foreseen that the Bank would suffer pecuniary harm as a result of the loan transaction because Mr. Weidner did not have funds sufficient to repay the loan, and Mr. Wittig never intended to repay the loan himself. Accordingly, it increased Mr. Wittig's offense level by 16 levels to 22. *See id.* § 2B1.1(b)(1)(I).

The district court then applied the Guidelines gross-receipts enhancement, which increased Mr.

Wittig's offense level to 24. *See id.* § 2B 1.1 (b)(12)(A). ("If the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels . . . . If the resulting offense level . . . is less than level **24**, increase to level **24**.") (This provision was renumbered as § 2B1.1(b)(13)(A) in the 2005 version of the Guidelines.). The court also applied the gross-receipts enhancement to Mr. Weidner. The commentary to the Guidelines forbids counting the same gross receipts for more than one defendant:

> For purposes of subsection (b)(12)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeds $1,000,000.

USSG § 2B1.1 cmt. n.9(A) (renumbered as cmt. n.11(A) in the 2005 version). But the district court justified application of the enhancement to both Mr. Weidner and Mr. Wittig essentially on the ground that Mr. Wittig had received $1.5 million from the Bank, whereas Mr. Weidner had received $1.5 million from Mr. Wittig.

Because Mr. Wittig had a criminal-history category of I, his Guidelines sentencing range was 51 to 63 months. The district court sentenced him to six concurrent terms of 51 months' imprisonment followed by three years of supervised release. It also ordered him to pay a $1 million fine.

On Mr. Wittig's appeal we held that the district court had erred in its application of both the intended-loss and gross-receipts enhancements. *See Wittig*, 437 F.3d at 1047-48. With respect to intended

loss, we said that "the district court did not adequately consider the amount of collateral provided by Mr. Wittig in determining the amount of loss under an intended loss theory." *Id.* at 1048. Before the district court could ignore the collateral pledged (the additional utility stock, life insurance benefits, and mortgage on his residence) when determining intended loss, it first had to "determine that the defendant intended to deprive the lender of its collateral." *Id.* Because the district court made no such finding, it "erred in calculating the amount of loss under the intended loss approach." *Id.*

As for the gross-receipts enhancement, we held that the district court "erred in attributing the $1.5 million in gross receipts to both Mr. Wittig and Mr. Weidner." *Id.* at 1046. We affirmed the enhancement as to Mr. Weidner, but reversed as to Mr. Wittig. *See id.* at 1047. We noted, however, that after *Booker* the Guidelines were no longer mandatory and the district court could appropriately consider a range of factors, including the "nature and circumstances of the offense," when determining an appropriate sentence. *Id.*; *see* 18 U.S.C. § 3553(a). In this case, we added, those circumstances included "that Mr. Wittig and Mr. Weidner each used the $1.5 million from the line of credit increase in different ways and derived some benefit from it." *Wittig*, 437 F.3d at 1047. We vacated the sentence and remanded for resentencing. *See id.* at 1050.

Before the resentencing hearing, the sentencing judge presided over a trial of Mr. Wittig on charges of engaging in a wide-ranging fraudulent scheme and conspiracy during his tenure at Westar. *See United States v. Wittig*, 425 F. Supp. 2d 1196, 1204 (D.Kan. 2000). We will refer to the trial as the Westar

Case. Mr. Wittig was found guilty on 39 counts of conspiracy, circumvention of internal controls, wire fraud, and money laundering, and was sentenced to 18 years' imprisonment. In addition, he was required to forfeit some of the items he had pledged as collateral for the $1.5 million loan from the Bank. *See United States v. Wittig*, No. 5:03-CR-40142JAR, 2006 WL 897599, *3 (D. Kan. April 3, 2006).

Also before the resentencing hearing, the district court released Mr. Wittig on bond pending his initial appeal. On January 19, 2006, the court revoked the bond upon finding that he had violated his conditions of release by engaging in unreported and unauthorized financial transactions.

The Presentence Investigation Report (PSR) prepared for the resentencing hearing calculated Mr. Wittig's offense level as the district court had at the initial sentencing: his base offense level was 6, an intended loss of $1.5 million justified a 16-level enhancement, and gross receipts of $1.5 million resulted in a total offense level of 24. At the hearing on June 24, 2006, the district court again used the gross-receipts enhancement to calculate Mr. Wittig's offense level. It expressed its understanding of our holding as saying that it had been error to apply the $1.5 million in gross receipts to both defendants because "the district court [had] not articulate[d] separate and independent and individual use of the gross receipts." Aplt. App. Vol. I at 128. To avoid repeating this perceived error, the district court enumerated the various ways that Mr. Wittig and Mr. Weidner each benefitted from the $1.5 million loan. It stated that Mr. Wittig benefitted from an increased line of credit, interest payments from Mr. Weidner, and the expectation of a quid-pro-quo from

Mr. Weidner and the Bank to provide financing for him to participate in an expected securities offering related to Westar. The court found that "Wittig and Weidner individually and separately and successively received the monies and used them in different manners and for different purposes. . . . This does establish separate and individual receipt and separate and individual use of the monies . . . ." *Id.* at 164. It further made a specific finding that Mr. "Wittig did in fact derive the $1.5 million, as is required by application of the gross receipts analysis guideline." *Id.* at 154-55.

As for intended loss, the district court acknowledged that "collateral pledged should be given credit," *id.* at 156, but added that much of the collateral was subject to forfeiture because it was obtained by fraud, so the line of credit was not "secured in a very secure fashion," *id.* It also reasoned that "the borrower's ability to pay is not an appropriate credit against intended loss [because] [i]f it were, it would be appropriate to call this credit the rich man's credit." *Id.*

Further considering evidence from the Westar Case, the district court said "that this particular [bank-fraud] transaction was part of a larger scheme in which this defendant intended to cause loss to Westar Energy of more than $1 billion. . . . The Court necessarily takes those facts and circumstances into account in fashioning a sentence under Section 3553(a)." *Id.* at 157-58.

When the district court pronounced sentence, it stated that it was "in essence applying both the gross receipts guideline and the intended loss guideline." *Id.* at 166. But, it added, "even if the gross receipts guideline did not apply or the intended loss would not

apply, the underlying nature and circumstances that [the court has] outlined in great detail here would still counsel this Court under 3553 to apply the sentence that [the court is] about ready to announce." *Id.* Without detailing how it determined Mr. Wittig's offense level, it stated that his total offense level was 24, the criminal-history level was I, and the Guidelines sentencing range was 51 to 63 months. It then "tentative[ly]" imposed concurrent sentences of 60 months' imprisonment on each count, and a $1 million fine. *Id.* at 166-68.

Next the district court stated that the tentative sentence was a reasonable sentence in light of the § 3553(a) factors. The court began by emphasizing its reliance on the Guidelines:

> In reaching this determination the Court has considered: One, that the sentencing range developed from the application of the advisory guidelines incorporates a number of directives from Congress to the Sentencing Commission concerning the sentencing of offenders, including the purposes of sentencing set forth at 18 U.S.C. Section 3553(a)(2). Therefore, a sentence imposed within the range determined by the guidelines may be given substantial weight in the determination of a just and reasonable sentence, in accordance with the provisions of 18 U.S.C. Section 3553(a)(2)(A) through (C).

Id. at 169. It then noted Mr. Wittig's failure to accept responsibility, evidence that he had engaged in new criminal behavior while on appeal bond, the lack of mitigating factors, and the seriousness of his offense. It expressed its belief that the sentence imposed promoted respect for the law and provided just punishment, and that Mr. Wittig's conduct

justified a sentence of the same length as his codefendant. Finally, the court stated that the sentence would protect the public, deter further criminal behavior, and allow Mr. Wittig to receive correctional treatment. The court did not, however, explain why the sentence imposed was justified even if the Guidelines range was only 0 to 6 months.

The district court's written sentence and Statement of Reasons was filed several days later. It stated that the court was adopting the PSR, except that it found that there was no intended loss under the Guidelines (despite the court's discussion of intended loss at the sentencing hearing). The court made no entry in Section VI of the Statement of Reasons, entitled "Court Determination for Sentence Outside the Advisory Guideline System." *Id.* at 209.

II. DISCUSSION

In *Booker*, 543 U.S. at 231-32, 259, the Supreme Court held that mandatory application of the Guidelines violated the Sixth Amendment, excised that portion of the statute that made them mandatory, and effectively rendered the Guidelines advisory. When reviewing a sentence post-*Booker*, we review for reasonableness, applying a two-step analysis. *See United States v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006). "First, we must determine whether the district court considered the applicable Guidelines range, reviewing its legal conclusions de novo and its factual findings for clear error. A non-harmless error in this calculation entitles the defendant to a remand for resentencing." *Id.* "[I]f we conclude that the district court correctly applied the Guidelines or that any errors were harmless," we proceed to the second step—considering whether the ultimate sentence imposed was reasonable. *United*

States v. Hernandez-Castillo, 449 F.3d 1127, 1129-30 (10th Cir. 2006).

A. Application of Guidelines

We hold that the district court again erred in computing Mr. Wittig's offense level under the Guidelines. The base offense level for Mr. Wittig's crime was 6. The only potential grounds for increasing it would be the gross-receipts enhancement, *see* USSG § 2B1.1(b)(12)(A), or the intended-loss enhancement, *see id.* § 2B1.1 (b)(l)(I). Neither ground applies.

Mr. Wittig argues that the district court disregarded our holding in *Wittig I* and impermissibly reapplied a gross-receipts enhancement to determine his offense level. We agree. Our prior opinion was categorical—"the district court erred in attributing the $1.5 million in gross receipts to both Mr. Wittig and Mr. Weidner." *Wittig*, 437 F.3d at 1046. The district court read our opinion to say that it was error to apply the $1.5 million in gross receipts to both defendants because "the district court did not articulate separate and independent and individual use of the gross receipts." Aplt. App. Vol. I at 128. We do not share that reading. At most our opinion noted that the cases relied on by Mr. Wittig could be distinguished from his case because "none . . . involved a series of offenses in which each defendant successively used the receipts in a separate fashion . . . ." *Wittig*, 437 F.3d at 1046. But to say that cases can be distinguished means only that they do not *control* the present case; it is not to say that their conclusions should be rejected. On the contrary, after noting the distinguishing factors in Mr. Wittig's case, we still proceeded to hold that Mr. Wittig was correct in challenging the applicability to his case of the

gross receipts guideline. *See id.* The only use we permitted the district court to make of the "gross-receipts" facts on remand was to consider them under § 3553(a) to impose a non-Guidelines sentence. *See id.* at 1047.

The parties dispute whether the district court also applied an intended-loss enhancement in computing Mr. Wittig's Guidelines offense level. The government argues that the district court correctly determined the offense level by applying an intended-loss enhancement. Mr. Wittig, in contrast, argues that the court's Statement of Reasons specifically found no intended loss under the Guidelines. The government urges us to apply the rule that when the oral sentence pronounced at sentencing is inconsistent with the later written sentence, the oral sentence controls. *See United States v. Villano*, 816 F.2d 1448, 1450 (10th Cir. 1987) (en banc) (plurality opinion). But that rule applies only to the sentence—that is, "the punishment imposed," *id.* at 1453—not the explanation for the sentence.

In any event, the evidence before the district court would not support an intended-loss enhancement. In *Wittig I* we noted that Mr. Wittig's loan was collateralized and that to "ignore collateral in determining intended loss, the court must first determine that the defendant intended to deprive the lender of its collateral." *Wittig*, 437 F.3d at 1048; *see United States v. Schild*, 269 F.3d 1198, 1201 (10th Cir. 2001) (borrower intended to deprive bank of collateral). The district court on remand made no finding of such an intent, there was no evidence that would support such a finding, and, indeed, we have been pointed to no evidence that Mr. Wittig intended the Bank to lose any money on its loan to him.

Thus, it was error for the district court to increase Mr. Wittig's offense level above the base offense level of 6. Given his criminal history category of I, his Guidelines sentencing range was 0 to 6 months, well below his actual sentence of 60 months. We now address whether this error was harmless.

B. Harmless Error

The government argues that the sentence should be affirmed even if the district court miscalculated Mr. Wittig's offense level because other factors make the sentence reasonable and the court said that it would impose the same sentence even if the gross-receipts and intended-loss enhancements did not apply. We are not persuaded.

To begin with, the reasonableness of the imposed sentence is irrelevant to the harmless-error analysis. A defendant is harmed by a reasonable sentence if the court, absent the error, would have imposed a lesser, but still reasonable, sentence. The government does not argue that Mr. Wittig received the lowest possible reasonable sentence.

The alternative sentence requires somewhat more discussion. We recognize that we have relied on a district court's expression of an alternative sentence in determining that *Booker* error was harmless. *See, e.g.*, *United States v. Serrano-Dominguez*, 406 F.3d 1221, 1224 (10th Cir. 2005). But those cases are readily distinguishable. In those cases the district court had correctly calculated the Guidelines sentencing range. The question was only whether the district court, if it had known that it had discretion to vary from the Guidelines range, would have exercised that discretion. A statement by the district court that it would not do so was an answer

to that question. *See id.* (court stated that in fashioning alternative sentence under § 3553(a) the court would apply "precisely the same sentence as the guidelines require" (internal quotation marks omitted)).

Here, however, the government asks us to assume that even if the district court had known that the sentence imposed was a dramatic variance from the highest possible Guidelines sentence, it would not have been influenced by that knowledge. We lack the government's confidence in that assumption. After all, in addressing the § 3553(a) factors the district court began by noting the substantial weight to be given to the Guidelines in arriving at a sentence. We cannot presume that the court would not have been influenced by knowing that the sentence being imposed was 10 times as long as the maximum under the Guidelines range. Moreover, although the court gave reasons why it believed the imposed sentence was reasonable, it failed to explain what "dramatic facts" justified "such an extreme divergence from the best estimate of Congress's conception of reasonableness expressed in the Guidelines." *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006). Unmarked in the Statement of Reasons was the section in which the court must explain why it imposed a non-Guidelines sentence. The court would need to explain what the Guidelines failed to take into account and why that omitted factor is of such enormous consequence. *See United States v. Bishop*, No. 05-3173, 2006 WL 3237027, at *10 (10th Cir. Nov. 9, 2006) (justification must be proportional to the variance).

In addition, we doubt the relevance of some of the considerations apparently relied on by the district

court in imposing sentence. As previously noted, there is no evidence to support a finding that Mr. Wittig intended a loss to the Bank; and the relationship of his loan to any loss intended to be inflicted on anyone else (in the Westar Case) is simply too tenuous to justify a variance from a Guidelines sentence. Indeed, if the district court is to use Mr. Wittig's conviction in the Westar Case to increase his sentence in this case beyond what would be appropriate as a result of considering his Westar conviction as part of his criminal history, the court will need to point to specific evidence justifying the increase. In other words, we understand why Mr. Wittig's sentence should reflect the criminal history established by his convictions in the Westar case; but we fail to understand why those convictions are otherwise relevant to his present sentence. The district court said that there was evidence that Mr. Wittig's accommodation to Mr. Weidner was part of a quid-pro-quo arrangement in which the Bank would later loan Mr. Wittig and others the sums necessary to exercise rights to purchase Westar stock, a central component of the scheme charged in the Westar case. The government, however, has failed to point us to that evidence, and we note the apparent inconsistency between the claim that Mr. Weidner needed such a quid-pro-quo inducement and the claim that exercise of the purchase rights was extremely advantageous to Mr. Wittig (thereby suggesting the attractiveness to the Bank of financing the purchases).

III. CONCLUSION

We VACATE Mr. Wittig's sentence and REMAND for resentencing in accordance with this opinion. Mr. Wittig's motion to enforce the mandate is DENIED.

ENTERED FOR THE COURT

Harris L Hartz
Circuit Judge

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed February 16, 2006]

Nos. 04-3084, 04-3118

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CLINTON ODELL WEIDNER, II and
DAVID C. WITTIG,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 02-CR-40140-01/02-JAR)

Bruce W. Simon, Kansas City, Missouri, for Defendant-Appellant Clinton Odell Weidner, II.

Steven A. Reiss, Weil, Gotshal & Manges LLP, New York, New York (Jeffrey D. Morris, Berkowitz, Stanton, Brandt, Williams & Shaw, Prairie Village, Kansas, and Gregory S. Coleman, Lisa R. Eskow, and Meredith B. Parenti, Weil, Gotshal & Manges LLP, Austin, Texas, with him on the briefs), for Defendant-Appellant David C. Wittig.

Richard L. Hathaway, Senior Litigation Counsel, Topeka, Kansas (Eric F. Melgren, United States Attorney, with him on the brief), for the Plaintiff-Appellee.

Before **HENRY**, **LUCERO**, Circuit Judges, and **BRACK**, District Judge.*

HENRY, Circuit Judge.

This federal criminal prosecution arises out of a $1.5 million loan from David C. Wittig to Clinton Odell Weidner, II. In April 2001, when Mr. Wittig made the loan, Mr. Weidner was the president, chief executive officer, and general counsel of the Topeka, Kansas bank at which Mr. Wittig did business. The government alleged that Mr. Weidner and Mr. Wittig concealed the loan, and the jury agreed, convicting both men of one count of conspiracy to submit false entries to a federally insured bank and to launder money, in violation of 18 U.S.C. § 371; four counts of making a false bank entry, in violation of 18 U.S.C. § 1005; and one count of money laundering, in violation of 18 U.S.C. § 1957. The jury also convicted Mr. Weidner of a criminal forfeiture count involving the Arizona real estate in which he had invested the $1.5 million that he had borrowed from Mr. Wittig. The district court sentenced Mr. Wittig to concurrent terms of fifty-one months' imprisonment on each of the six counts, followed by a three-year term of supervised release, and ordered him to pay a $1 million fine. The court sentenced Mr. Weidner to concurrent terms of seventy-eight months' imprisonment, also followed by three years' supervised release.

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*The Honorable Robert C. Brack, United States District Judge for the District of New Mexico, sitting by designation.

In this appeal, Mr. Weidner and Mr. Wittig raise a variety of issues relating to the sufficiency of the evidence and the adequacy of the jury instructions. They also challenge their sentences, arguing that the district court erred in calculating the amount of loss and in basing their sentences on factual findings not made by the jury.

Although the government's case was largely circumstantial, we conclude that the evidence was sufficient and that the jury instructions were adequate. However, as to the defendants' sentencing challenges, we conclude that, in light of the ambiguity of the Guidelines, the district court did err in calculating the amount of the loss. Accordingly we affirm the defendants' convictions, vacate their sentences, and remand the cases for resentencing in accordance with this opinion and the principles set forth in United States v. Booker, 543 U.S. 220 (2005).

I. BACKGROUND

In recounting the relevant facts, we view the record in the light most favorable to the government. See United States v. Radcliff, 331 F.3d 1153, 1157 (10th Cir. 2003).

A. The Loan Transactions

During 2001 and 2002, Mr. Weidner was the president, chief executive officer, and general counsel of Capital City Bank in Topeka, Kansas. Mr. Wittig was an established Capital City Bank customer with substantial assets: a March 2001 financial statement on file with the bank reported a net worth of $33.921 million. He was the chairman of the board, president, and chief executive officer of Western Resources, Inc., the largest electric utility in Kansas.

In 1998, Mr. Wittig borrowed $700,000 to purchase the Landon Mansion in Topeka, Kansas. Two years later, he opened a $1 million line of credit in order to renovate the mansion. By April 2001, Capital City Bank had increased Mr. Wittig's line of credit to $3.5 million.

In early 2001, Michael Earl, another Capital City Bank customer, approached Mr. Weidner about a real estate project in Scottsdale, Arizona that required a $1.5 million investment. Mr. Earl told Mr. Weidner that he was not capable of making this investment, but he asked Mr. Weidner if he knew of anyone who would be interested.

Mr. Weidner informed Mr. Wittig of the Arizona project and asked if he was interested. Mr. Wittig responded that he thought that the investment was a great opportunity but had other projects that he wanted to pursue instead. In particular, Mr. Wittig explained that he thought he could get a better return at less risk by investing in a new utility company called Westar.

Mr. Weidner then told Mr. Earl of his own interest in the Arizona project, and he reached an agreement with Mr. Earl requiring a $1.5 million investment in exchange for an interest in the real estate. Mr. Weidner did not have the $1.5 million he needed to make the investment. Moreover, as to its employees, Capital City Bank rules limited loans not involving a principal residence or children's educational expenses to $100,000. Accordingly, Mr. Weidner needed to look elsewhere for funds, and he approached Mr. Wittig about a loan.

In late April 2001, Mr. Weidner directed his administrative assistant, Christy Gurney, to prepare

a loan proposal increasing Mr. Wittig's line of credit from $3.5 million to $5.0 million. The proposal characterized its purpose as a "[s]hort term increase of [Mr. Wittig's] operating line for investments & renovation costs," Wittig App. at 523, adding that "David is the President and CEO of Western Resources, Inc. He utilizes the Line of credit to purchase stock and make business investments. He is also using the line to complete the final renovation costs of the Landon mansion as well as their personal funds." Id. at 524. At trial, Ms. Gurney testified that Mr. Weidner provided her with the information that she included in the loan proposal. The owner of Capital City Bank, Frank Sabatini, approved the proposal on April 27, 2001. According to Ms. Gurney, Mr. Wittig did not review the written loan proposal before it was approved.

On April 30, 2001, however, Mr. Wittig and his wife did sign a "Change In Terms Agreement" related to the $1.5 million increase in the line of credit. A printed section of that document stated that the existing indebtedness was "the promissory note from borrower to lender dated 7/30/00" and that "this change in terms will serve to increase the line from the current availability of $3,500,000 to a line availability of $5,000,000." Id. at 528-29, 532. Mr. Wittig crossed out the $5 million figure and wrote "$6,000,000" instead. The change of terms agreement provided for interest at an initial annual rate of 5.39% and contained provisions regarding default, set off, and collateral. However, the agreement contained no further description of the purpose of the increase in the line of credit. The agreement also included a printed section stating that "[t]his written agreement is the final expression of the agreement between Lender and Borrower and may not be

contradicted by evidence of any prior oral agreement or contemporaneous oral agreement between Lender and Borrower." Id. at 528. Finally, a section concerning "nonstandard terms" was left blank.

Mr. Wittig faxed the signed agreement to Ms. Gurney at Capital City Bank. On the same day, April 30, 2001, two transactions posted to Mr. Wittig's account at Capital City Bank: a $1.5 million deposit and a $1.5 million withdrawal. The $1.5 million was routed to Security Title in Phoenix, Arizona, the company handling the real estate transaction in which Mr. Weidner wanted to invest. Ms. Gurney testified at trial that she had not personally ordered the wire transfers and did not know who had done so. However, she added that Mr. Weidner had the authority and ability to make the wire transfers himself.

On the following day, Mr. Weidner and Mr. Wittig executed a promissory note that required Mr. Weidner to pay Mr. Wittig $1.5 million at 7 % interest in one payment of the $1.5 million principal plus interest (due in a year), as well as quarterly interest payments beginning on August 1, 2001. The note was secured by the accounts, contract rights, and general intangibles of the Arizona real estate project. At trial, an FDIC official testified that this promissory note was not discovered in the regular examinations of the bank's records. In the following weeks, Mr. Wittig received two additional $500,000 increases in his line of credit at Capital City Bank–one on May 14, 2001, and another on June 7, 2001.

Mr. Weidner and Mr. Wittig both filed documents with the bank that failed to disclose the $1.5 million loan between them. First, on May 14, 2001, Mr. Weidner submitted his responses to an officer's

questionnaire, part of a regular examination of the bank by the FDIC. One question asked Mr. Weidner to "[l]ist all extensions of credit made for the accommodation or direct benefit of anyone other than those whose names appear either on the note or on other related credit instruments." Wittig App. at 685. Mr. Weidner responded "none." Id. Second, on May 31, 2001, Mr. Weidner submitted an annual personal financial statement on a preprinted form containing a section listing notes, accounts, and bills and contracts payable. Mr. Weidner left that section blank. Finally, on January 8, 2002, Mr. Wittig and his wife submitted an annual financial statement required by the terms of their credit agreement with the bank. The Wittigs stated that they had $5.5 million in liabilities to Capital City Bank but did not list a $1.5 million loan to Mr. Weidner as an asset.

In late July 2001, soon before the first payment on the $1.5 million note from Mr. Wittig came due, Mr. Weidner requested a loan of $20,000 from the Capital City Bank. In the loan application, he stated that the purpose of the loan was to finance the purchase of a Harley Davidson motorcycle. Mr. Weidner obtained the loan and deposited the $20,000, along with a personal check for $7,000, into an account at a different bank, Capitol Federal Savings and Loan. At Capitol Federal, Mr. Weidner drew a cashier's check payable to Mr. Wittig. Mr. Wittig deposited this check into a money market account at a third bank.

Mr. Weidner made additional payments to Mr. Wittig: one on January 31, 2002, for $52,500, and another one on May 6, 2002, for $17,500. He used his account at Capitol Federal to make those payments, and, in conjunction with that Capitol Federal account, he submitted a financial statement that

again omitted his liability to Mr. Wittig on the $1.5 million note.

At Capital City Bank, Mr. Weidner first disclosed the loan from Mr. Wittig in a conversation with his administrative assistant Ms. Gurney in June 2001. He told her that he was the beneficiary of the $1.5 million increase in Mr. Wittig's line of credit in April 2001. He added that he had invested the money in a luxury subdivision and that he hoped to make a $1 million profit.

In October 2001, Ms. Gurney relayed that information to Bob Kobberman, who was then Capital City's chief loan officer. Bank officials filed a suspicious activity report with the FDIC and also conveyed the information about the Wittig-Weidner loan to the bank's bonding company. After the disclosure of the loan, Mr. Weidner asked a friend, J.B. McGivern, to pay back the loan from Mr. Wittig. Mr. McGivern obtained the money and transferred it to Mr. Weidner's Arizona partner, Michael Earl. Mr. Earl then transferred the funds to Mr. Wittig's account at Capital City Bank, and Mr. Wittig paid down his line of credit by $1.6 million.

In April 2002, Mr. Weidner resigned from his position with Capital City Bank. Bank officials asked Mr. Wittig to pledge additional utility stock, to increase the mortgage on his personal residence, and to provide $1 million in life insurance benefits to properly collateralize the loan. Mr. Wittig complied with those requests. In July 2002, he paid off his line of credit with Capital City and opened accounts with another bank.

B. The Government's Allegations

The government charged Mr. Weidner and Mr. Wittig with the following offenses: conspiracy to submit false entries to a federally insured bank and to launder money, in violation of 18 U.S.C. § 371 (count 1); making or aiding and abetting in the making of false bank entries, in violation of 18 U.S.C. § 1005 and 18 U.S.C. § 2 (counts 2-5); and money laundering, in violation of 18 U.S.C. § 1957 (count 6). The government also sought criminal forfeiture of the Arizona real estate (count 7).

The false bank entries alleged in counts 2 through 5 concerned the documents that failed to reveal a $1.5 million loan from Mr. Wittig to Mr. Weidner: (a) the April 27, 2001 loan proposal stating that Mr. Wittig was requesting a $1.5 million increase in his line of credit to renovate the Landon Mansion and to make business investments (count 2); (b) Mr. Weidner's May 14, 2001 response to the FDIC's questionnaire (count 3); (c) Mr. Weidner's annual financial statement, submitted to Capital City Bank on May 31, 2001 (count 4); and (d) the Wittigs' January 8, 2002 financial statement, submitted to Capital City Bank under the terms of their credit agreement (count 5).

C. Mr. Wittig's Defense

At trial, Mr. Wittig did not contest making the loan to Mr. Weidner. However, he argued that he reasonably assumed that the Capital City Bank officials knew about the loan and that he in no way authorized Mr. Weidner's false statements.

In support of his defense, Mr. Wittig noted that he was not involved in the preparation of the April 27, 2001 loan proposal requesting the $1.5 million

increase in his line of credit, and he contended that he did not even see the document before the increase was approved. Similarly, Mr. Wittig pointed to Mr. Weidner's testimony that Mr. Wittig was not involved in any way in the submission of the May 14, 2001 questionnaire responses and the May 31, 2001 financial statement. Additionally, Mr. Wittig invoked the testimony of Michael Earl, the man who had informed Mr. Weidner about the Arizona real estate opportunity. Mr. Earl stated that he believed that Capital City Bank officials knew about Mr. Weidner's Arizona real estate investment because Mr. Weidner was the head of the bank and, if Mr. Weidner knew about the investment, Mr. Earl assumed the bank knew too. According to Mr. Wittig, he made the same assumption about the $1.5 million loan to Mr. Weidner—that Mr. Weidner would inform the bank.

As to his own financial statement, which also did not disclose a $1.5 million loan to Mr. Weidner, Mr. Wittig argued to the jury that the document was submitted after Mr. Weidner had confided in Ms. Gurney about the loan and after Ms. Gurney had informed Mr. Kobberman, the bank's chief loan officer, about the transaction. Thus, he contended that the omission of the loan from the financial statement was not intended to injure or defraud the bank. Moreover, Mr. Wittig observed, like other financial statements he had submitted to the bank, this one omitted other assets and liabilities, such as a $1 million mortgage from Capital City Bank on his home. According to Mr. Wittig, all of the omitted items were linked to transactions with Capital City Bank or other information that the bank, through Mr. Weidner, already knew. Mr. Wittig further contended that the omission was not material: the

financial statement listed $38 million in assets, which far exceeded Mr. Wittig's outstanding debt to Capital City Bank.

Mr. Wittig also challenged the government's contention that his depositing loan payments from Mr. Weidner into a money market account outside of Capital City Bank demonstrated his intent to conceal the loan. He noted that he did not have a money market account at Capital City Bank and that the government's own witnesses acknowledged that money market accounts typically pay higher interest rates than checking accounts. Moreover, he added, he had used the money market account for years, and he submitted records of deposits into the account for more than a year before the deposits of Mr. Weidner's interest payments on the $1.5 million loan.

Finally, Mr. Wittig attacked the government's "quid pro quo" theory—that Mr. Wittig had made the loan to Mr. Weidner in order to obtain financing for a new utility company. He argued that there was no need for the alleged quid pro quo because the board of directors of Capital City Bank had openly discussed lending money to the utility company executives, including Mr. Wittig, and because this transaction was widely regarded as an outstanding business opportunity for the bank. Additionally, under the bank's lending rules, the proposed financing of the utility exceeded the amount that Mr. Weidner could personally approve.

D. Mr. Weidner's Defense

Mr. Weidner pleaded guilty to counts 3 and 4 (making false entries on the May 14, 2001 questionnaire responses and the May 31, 2001 financial statement), but he defended the remaining

counts at trial. His defense as to the conspiracy count, the allegedly false statements on the April 27, 2001 loan proposal, and the money laundering charge (counts 1, 2, and 6) was that he had not intended for the $1.5 million increase in Mr. Wittig's line of credit to be used for the Arizona venture. He testified that, although he did intend to borrow money from Mr. Wittig, his understanding was that the money would come from a source outside Capital City Bank. As to Mr. Wittig's January 8, 2002 financial statement (the subject of count 5), Mr. Weidner maintained that the statement was submitted by Mr. Wittig acting alone.

E. The Judge's Findings at Sentencing

After the jury convicted Mr. Wittig and Mr. Weidner, the district court applied the 2001 version of the United States Sentencing Guidelines (USSG) (those in effect at the time of the offense conduct). The sentencing proceedings focused on the determination of the offense level based on the amount of loss.

The court determined the amount of loss in two ways. Applying USSG § 2B1.1(b)(12), the court considered the gross receipts that the defendants had obtained from the offenses of conviction. The court also determined the amount of intended loss. The court found that both Mr. Wittig and Mr. Weidner had received $1.5 million in gross receipts and that they had each intended a loss of that amount. As to Mr. Weidner, the court further found that he had obstructed justice and that he had abused a position of trust. Applying USSG §§ 3C1.1 and 3B1.3, the court increased Mr. Weidner's offense level by two points for each of those findings.

As to Mr. Wittig, the court imposed concurrent sentences of fifty-one months' incarceration, a fine of $1 million, and a three-year term of supervised release. The court sentenced Mr. Weidner to concurrent terms of seventy-eight months' incarceration and three years' supervised release.

II. DISCUSSION

In these appeals, Mr. Wittig and Mr. Weidner both challenge the sufficiency of the evidence supporting their (a) 18 U.S.C. § 371 conspiracy convictions; (b) 18 U.S.C. § 1005 bank fraud convictions; and (c) 18 U.S.C. § 1957 convictions for money laundering. Mr. Wittig further argues that (d) the district court erred in admitting evidence concerning his wealth and his executive employment agreement with the utility company; and (e) the court erred in instructing the jury on the § 1005 count and in refusing to give an instruction that nominee loans are not illegal per se.

Both defendants also challenge their sentences on several grounds. Mr. Wittig argues that (f) the district court erred in calculating the amount of loss under USSG § 2B1.1(b)(12) based on loan proceeds he received because the court had already determined that Mr. Weidner had benefitted from those proceeds. Both defendants argue that (g) the district court erred in increasing the offense level based on intended loss under USSG § 2B1.1(b)(1)(I) when the loan obtained by Mr. Wittig was fully collateralized and fully repaid; and (h) the district court violated their Sixth Amendment rights by relying on facts not found by the jury in imposing the sentence.

For the reasons set forth below, we must reject the defendants' various challenges to their convictions. However, as to their sentences, we conclude that the

district court erred in calculating the amount of loss and we therefore remand for resentencing under the principles set forth in United States v. Booker, 543 U.S. 220 (2005).

A. Sufficiency of Evidence Supporting § 371 Conspiracy Convictions

At the close of the government's case, the district court denied Mr. Wittig's and Mr. Weidner's motions for judgments of acquittal on the conspiracy charge and the substantive offenses. Both defendants now challenge that decision.

We engage in de novo review. United States v. Bush, 405 F.3d 909, 919 (10th Cir. 2005). In doing so, we consider both direct and circumstantial evidence, and all reasonable inferences therefrom, in the light most favorable to the government. Id. We do not "question the jury's credibility determinations or its conclusions about the weight of the evidence." United States v. Lazano-Villalobos, 175 F.3d 838, 843 (10th Cir. 1999). There is sufficient evidence to support a conviction if "a reasonable jury could find the defendant guilty beyond a reasonable doubt." Bush, 405 F.3d at 919 (quotation and citation omitted). Nevertheless, "[t]he evidence, when viewed in its entirety, must generate more than a mere suspicion of guilt, and where such evidence is equally consistent with both guilt and innocence the conviction cannot be sustained." United States v. Fox, 902 F.2d 1508, 1513-14 (10th Cir. 1990) (quoting Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943)). Additionally, "we may not uphold a conviction obtained by piling inference upon inference." United States v. Valadez-Gallegos, 162 F.3d 1256, 1262 (10th Cir. 1998).

We begin with the 18 U.S.C. § 371 conspiracy charge. In order to convict a defendant of that offense, the government must prove beyond a reasonable doubt that (1) the defendant entered into an agreement; (2) the agreement involved a violation of the law; (3) one of the members of the conspiracy committed an overt act; (4) the overt act was in furtherance of the conspiracy's object; and (5) the defendant wilfully entered the conspiracy. United States v. Dazey, 403 F.3d 1147, 1159 (10th Cir. 2005).

"The core of a conspiracy is an agreement to commit an unlawful act." United States v. Morehead, 959 F.2d 1489, 1500 (10th Cir. 1992) (quoting United States v. Esparsen, 930 F.2d 1461, 1471 (10th Cir. 1991)). "[T]he critical inquiry is whether the circumstances, acts, and conduct of the parties are of such a character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists." Id. (quoting United States v. Kendall, 766 F.2d 1426, 1431 (10th Cir. 1985)). The existence of the agreement to violate the law may be inferred from a "unity of purpose or common design and understanding" among conspirators to accomplish the objects of the conspiracy. Kendall, 766 F.2d at 1431.

Secrecy and concealment are often necessary to a successful conspiracy, and, as a result, direct evidence of the crime is frequently difficult to obtain. Dazey, 403 F.3d at 1159. "Therefore, conspiracy convictions may be based on circumstantial evidence, and the jury may infer conspiracy from the defendants' conduct and other circumstantial evidence indicating coordination and concert of action." Id.

Moreover, a conspiracy conviction requires "at least the degree of criminal intent necessary for the

substantive offense itself." Morehead, 959 F.2d at 1500 (internal quotation marks omitted). Thus, mere knowledge or acquiescence in the purposes of the conspiracy is not sufficient to establish the defendant's willful entry into the conspiracy. United States v. Migliaccio, 34 F.3d 1517, 1521 (10th Cir. 1994). Instead, the government must establish "informed and interested cooperation, stimulation, [or] instigation." Direct Sales, 319 U.S. at 713.

Here, the government alleged that Mr. Weidner and Mr. Wittig engaged in a conspiracy to make false bank entries in violation of 18 U.S.C. § 1005 and to launder money in violation of 18 U.S.C. § 1957. A § 1005 conviction requires the government to prove that the defendant knowingly made a false bank entry or caused such a false entry to be made and that the defendant intended to defraud one or more of the bank's officers, auditors, examiners, or agents. United States v. Evans, 42 F.3d 586, 592 (10th Cir. 1994). Section 1957 requires the government to prove the defendant's knowing engagement in a transaction involving criminally derived property; the defendant must know that the property in question is "criminally derived." United States v. Allen, 129 F.3d 1159, 1164 (10th Cir. 1997) (quoting United States v. Pettigrew, 77 F.3d 1500, 1513 (5th Cir. 1996)). As a result, in order to establish the § 371 conspiracy charge against Mr. Weidner and Mr. Wittig, the government was required to prove that the two men agreed to make false bank entries to defraud bank officials, and to knowingly engage in a transaction involving criminally derived property.

With those principles in mind, we address each defendant's contentions in turn.

1. Mr. Wittig

In challenging his § 371 conspiracy conviction, Mr. Wittig repeats the arguments that he advanced at trial—that Mr. Weidner acted independently in completing the April 27, 2001 loan proposal, May 14, 2001 questionnaire responses, and May 31, 2001 personal financial statement, and that, as to Mr. Wittig's own January 8, 2002 financial statement, the government failed to establish that the omission of the $1.5 million loan to Mr. Weidner demonstrated an intent to deceive the bank. As a customer of Capital City Bank, Mr. Wittig maintains, he reasonably assumed that Mr. Weidner would fulfill his obligations to disclose the loan to the bank, and Mr. Weidner's failure to do so is insufficient to prove the § 371 conspiracy charge.

We acknowledge that the sufficiency of the evidence against Mr. Wittig presents a close issue. The government's theory was that the $1.5 million increase in Mr. Wittig's line of credit in April 2001 was a nominee loan, a sham transaction in that Mr. Wittig was not the actual borrower and that the purpose of the increase was not to renovate the Landon Mansion and fund Mr. Wittig's other investments, as the April 27, 2001 loan proposal stated, but rather to provide Mr. Weidner with funds to invest in Arizona real estate. See United States v. Waldroop, 431 F.3d 736, 741 (10th Cir. 2005) (discussing nominee loans). "Nominee loans are not inherently illegal, but are illegal if they are used to deceive a financial institution about the true identity of a borrower." Id.; see also United States v. Saks, 964 F.2d 1514, 1519 (5th Cir. 1992) (stating that "[c]ourts have on several occasions concluded that if a borrower obtains funds at the insistence of and for

the benefit of a bank officer, without disclosing the officer's interest on the loan documents, thereby knowingly flouting banking rules and regulations designed to protect the financial integrity of the bank, a jury can conclude that both borrower and officer acted with intent to defraud the bank"); United States v. Shively, 715 F.2d 260, 266 (7th Cir. 1983) (observing that "[t]here is no law against a bank customer's lending to a bank officer, but [the defendant bank customer] refused to lend [the defendant bank official] his own money; and the bank would not wittingly have helped [the customer] get a hold over [the bank official] by providing [the customer] with money to lend to [the bank official]").

In contrast to many of the reported cases involving nominee loans, the government here presented no direct evidence that the alleged nominal borrower, Mr. Wittig, suggested to the actual borrower, Mr. Weidner, that a nominee loan scheme could be used to deceive the bank and obtain the loan. See Waldroop, 431 F.3d at 738, 742 (discussing evidence that the defendant "came up with the plan to use nominee loans as a way around [the bank's borrowing] limit" and that the defendant had stated that "he personally could not get a loan" and had therefore suggested that the co-defendant sign the loan application); United States. v. Kennedy, 564 F.2d 1329, 1341 (9th Cir. 1977) (discussing direct evidence that the defendant told a co-defendant to include false information on a loan application).

Nevertheless, the government did present substantial circumstantial evidence of Mr. Wittig's participation in the alleged conspiracy. First, in order to obtain the $1.5 million increase in his line of credit in April 2001, Mr. Wittig signed a change in

terms agreement that closely resembled other change in terms agreements that he signed in order to increase his line of credit (e.g., the agreements he signed in May and June 2001). The April 2001 change in terms agreement described an increase in Mr. Wittig's line of credit, not a loan to Mr. Weidner, and it recited that there were no non-standard terms. Yet the government's evidence supported the inference that Mr. Wittig intended the $1.5 million to be used by Mr. Weidner for an investment in which Mr. Wittig himself had declined to participate.

Another aspect of that change in terms agreement supports the government's contention that Mr. Wittig was involved in concealing the loan to Mr. Weidner. Although the April 27, 2001 loan proposal prepared by Ms. Gurney requested an increase in the line of credit from $3.5 million to $5 million, Mr. Wittig sought to modify the request by deleting the $5 million figure on the change in terms agreement and writing in $6 million. The fact that Mr. Wittig sought and obtained two additional $500,000 line of credit increases shortly thereafter permits the inference that, in making the request for $6 million on April 27, Mr. Wittig sought to obtain $1.5 million for Mr. Weidner and $1 million for himself through one single line of credit increase and that he sought to do so without disclosing that part of the requested increase was for Mr. Weidner.

Moreover, the loan transaction between Mr. Wittig and Mr. Weidner was structured in such a way that Mr. Weidner himself received no direct payments from Mr. Wittig. Instead, the $1.5 million was deposited in Mr. Wittig's account and then transferred on the same day to the Arizona title company managing the Arizona real estate

transaction. As the district court noted, this was the first of several instances in which "[the] transfer of funds between Weidner and Wittig occurred in a manner in which it could be concealed from others at Capital City [Bank] and from [Capital City's] bank examiners." Wittig App. at 1742. Even though there was no direct evidence that Mr. Wittig ordered the $1.5 million wire transfer to the Arizona company, the evidence permitted the jury to infer at a minimum that he acquiesced in the transfer: Ms. Gurney testified that Mr. Wittig closely monitored his financial transactions at the bank, and there is no indication that he objected to the $1.5 million transfer.

Finally, perhaps the strongest evidence of Mr. Wittig's participation in the concealment of the loan to Mr. Weidner comes from the document that he did prepare and submit to the bank–the January 8, 2002 financial statement that did not list the loan in stating his assets and liabilities. At trial, Mr. Wittig did offer an explanation of this omission: he contended that he did not disclose it because he believed that the bank knew about the loan. He also observed that the financial statement omitted other significant assets and liabilities.

For several reasons, the jury could reasonably have rejected these explanations and found the omission of the loan to demonstrate Mr. Wittig's participation in the conspiracy. First, even though, by January 2002, Ms. Gurney had conveyed to the bank's chief loan officer that Mr. Weidner was the beneficiary of the $1.5 million line of credit increase, there is no evidence that Mr. Wittig knew about that conversation and would have relied on it in failing to disclose the loan. Moreover, Mr. Wittig's January 8,

2002 financial statement did list the line of credit with Capital City Bank. However, the statement described the line of credit solely as a $5.5 million liability of Mr. Wittig; there was no reference to the fact that part of that "liability" was offset by Mr. Weidner's obligation to pay the $1.5 million promissory note. Thus, the jury could view Mr. Wittig's listing of the line of credit as qualitatively different from other assets and liabilities, such as his home mortgage, which were not mentioned at all. Rather than an inadvertent omission, the failure to list the loan to Mr. Weidner could be viewed as a knowing concealment of a nominee loan. See United States v. Walker, 871 F.2d 1298, 1309 (6th Cir. 1989) (stating that the fact that a particular document could be read in two ways, one favorable to the defendant and one favorable to the government, did not establish that the district court erred in denying the defendant's motion for a judgment of acquittal because the court was required to view the evidence in the light most favorable to the government).

Viewed as a whole, this evidence permits the conclusion that Mr. Wittig willfully entered into an agreement to violate the bank fraud and money laundering statutes and that he and Mr. Weidner committed overt acts in furtherance of this conspiracy. If one or more of the individual pieces of evidence we have discussed had been lacking, then the conspiracy charge might have required the kind of "inference upon inference" that courts have deemed insufficient. See Valadez-Gallegos, 162 F.3d at 1262. However, the jury here heard evidence of a pattern of concealment of the loan to Mr. Weidner—in the change in terms agreement, in the direct payment of $1.5 million from Mr. Wittig's account to the Arizona real estate investment, and in the

omission of the loan to Mr. Weidner on Mr. Wittig's financial statement—sufficient to establish the elements of the conspiracy charge beyond a reasonable doubt.

2. Mr. Weidner

Mr. Weidner challenges his § 371 conviction on related grounds. First, he criticizes the government's quid pro quo theory—that Mr. Wittig loaned the $1.5 million to Mr. Weidner because Mr. Wittig wanted to obtain financing for a new utility company. Mr. Weidner points to evidence that the proposal to create the new company was public knowledge, that financing required participation by other lending institutions, and that, as a result, Mr. Weidner could not personally assure that Mr. Wittig would obtain the needed financing for the new company. Second, Mr. Weidner contends that the loan transaction was not "per se improper," Weidner's Br. at 28, and that the loan was a legitimate way in which Mr. Wittig could further his business interests. He maintains that loans obtained for third parties are not illegal.

These arguments do not persuade us. Although some of the government's quid pro quo evidence was indeed tenuous, the government was not required to prove a specific motive in order to convict the defendants of the charged § 371 conspiracy. See Shively, 715 F.2d at 267 (stating, in a prosecution for the misapplication of bank funds against a bank customer and a bank official under 18 U.S.C. §§ 656 and 1014, that "[i]t is unimportant whether [the customer loaned money to the official] out of pure friendship, or, as is more likely, to ingratiate himself with the officer of a bank with which he did business both as supplier and as borrower"). The gist of the government's case was that the defendants made

false statements so that Mr. Weidner could obtain the loan from Mr. Wittig.

As to Mr. Weidner's contention that loans obtained for third parties are not per se illegal, we agree. See Waldroop, 431 F.3d at 741. However, the government's case was based not merely on Mr. Wittig's obtaining money for a third party but on the concealing of the loan from the bank. Thus, the fact that these loans are not per se illegal does not undermine the government's case.

From the evidence we have discussed, a jury could reasonably conclude that Mr. Weidner willfully entered into a conspiracy with Mr. Wittig to violate the bank fraud and money laundering statutes (§§ 1005 and 1957) and that the two men each committed overt acts in furtherance of that conspiracy. In particular, Ms. Gurney testified that Mr. Weidner directed her to complete the April 27, 2001 loan proposal, and it is undisputed that the proposal omits any reference to the line of credit increase being used to fund a loan from Mr. Wittig to Mr. Weidner. Moreover, on the same day it was deposited into Mr. Wittig's account, the $1.5 million was transferred to the Arizona project in which Mr. Weidner wanted to invest. Additionally, Mr. Weidner acknowledged that his responses to the officer's questionnaire and his personal financial statement made no reference to the $ 1.5 million loan from Mr. Wittig.

We therefore reject Mr. Weidner's sufficiency of the evidence challenge to his § 371 conspiracy conviction.

B. Sufficiency of Evidence Supporting § 1005 Bank Fraud Convictions

Both Mr. Wittig and Mr. Weidner challenge their § 1005 bank fraud convictions. In order to establish a

violation of § 1005, the government must establish beyond a reasonable doubt that: "(1) an entry made in bank records is false; (2) the defendant made the entry or caused it to be made; (3) the defendant knew the entry was false at the time he . . . made it; and (4) the defendant intended that the entry injure or defraud the bank or public officers." United States v. Chaney, 964 F.2d 437, 448 (5th Cir. 1992). The Supreme Court has described the aim of the statute as "giv[ing] assurance that upon an inspection of a bank, public officers and others would discover in its books of account a picture of its true condition." United States v. Darby, 289 U.S. 224, 226 (1933); see also United States v. Cordell, 912 F.2d 769, 773 (5th Cir. 1990) (citing Darby for the same proposition).

Under § 1005, "an omission of material information qualifies as a false entry." Cordell, 912 F.2d at 773; see also United States v. Copple, 827 F.2d 1182, 1187 (8th Cir. 1987) ("[A]n omission where an honest entry would otherwise be made can be a false entry for section 1005 purposes."). "The entry is rendered no less false simply because, through considerable effort and a piecing together of minute details, the bank might have been able to discover the truth." United States v. Luke, 701 F.2d 1104, 1108 n.7 (4th Cir. 1983); see, e.g., Phillips v. United States, 406 F.2d 599, 601 (10th Cir. 1969) (affirming a § 1005 conviction based upon nominee loans and loans to fictitious parties even though microfilm bank records revealed the true nature of the transactions and stating that "the fact that [an entry's] falsity may be exposed by an examination of other books of account, does not render it any less a false entry made with intent to deceive" (internal quotation marks and citation omitted)). Additionally, the defendant himself need not make the false entries in bank

records; "it suffices that he set in motion management actions that necessarily caused [bank personnel] to make false entries." United States v. Wolf, 820 F.2d 1499, 1504 (9th Cir. 1987).

With those principles in mind, we turn to each defendant's challenge to the § 1005 convictions. As set forth above, there are four allegedly false entries at issue: (1) the April 27, 2001 loan proposal stating that Mr. Wittig was requesting a $1.5 million increase in his line of credit to renovate the Landon Mansion and make business investments (count 2); (2) Mr. Weidner's May 14, 2001 responses to the FDIC's questionnaire (count 3); (3) Mr. Weidner's annual financial statement, submitted to Capital City Bank on May 31, 2001 (count 4); and (4) Mr. Wittig's January 8, 2002 financial statement (count 5). These documents do not contain any reference to a $1.5 million loan from Mr. Wittig to Mr. Weidner.

1. Mr. Wittig

a. application of § 1005 to bank customers

In challenging his § 1005 convictions, Mr. Wittig first invokes the Third Circuit's decision in United States v. Barel, 939 F.2d 26, 38-41 (3d Cir. 1991). There, the court held that a defendant who had submitted false information about his social security number in opening an account could not be prosecuted under section 1005 because "the legislative history . . . shows that Congress intended the statute to apply only to bank insiders or their accomplices." Id. at 39 (emphasis added). The court also held that under the particular facts of the case, the defendant could not be convicted under an aiding or abetting theory. See id. at 42 (concluding that "[the defendant's] acts causing bank employees to

make false entries in the bank's books, although intentional in the general sense of the word, were merely a byproduct of his specific intent to defraud his wife").

Barel does not foreclose the government's prosecution of Mr. Wittig for violating § 1005 because, unlike the prosecution in that case, the government here alleged (and the jury found) that Mr. Wittig conspired with a bank official to make false bank entries in violation of the statute. Many courts, including this one, have held that a bank customer may be convicted of violating § 1005, and other federal bank fraud statutes, if he or she conspires with a bank official or aids and abets the official's violation of the statute. See, e.g., Phillips, 406 F.2d at 601-02 (affirming a § 1005 conviction of a bank customer on the grounds that he aided and abetted a bank president in making false entries); see also Copple, 827 F.2d at 1186 (affirming convictions of bank customers under § 1005 and other federal bank fraud statutes and stating that "[the] [d]efendants have been charged with aiding and abetting and conspiring with [a bank officer who] held a position sufficient to trigger jurisdiction of the statutes specified in the indictment"); Luke, 701 F.2d at 1108 (affirming bank customers' convictions for aiding, abetting and causing the making of a false entry in bank records, in violation of 18 U.S.C. §§ 2 and 1005).

Thus, Mr. Wittig's status as a bank customer did not bar his prosecution under § 1005.

b. participation in conduct alleged in counts 2-4

Mr. Wittig directs another challenge at counts 2-4, which involve the April 27, 2001 loan proposal, Mr.

Weidner's May 14, 2001 response to the officer's questionnaire, and Mr. Weidner's May 31, 2001 financial statement. He notes that these documents were prepared by Mr. Weidner and Ms. Gurney, and he contends that there was no evidence that he aided and abetted in the preparation and submission of these documents.

As we have observed above, in order to convict a defendant of a violation of § 1005, the government is not required to prove that the defendant made the false bank entries himself. See Wolf, 820 F.2d at 1504. A defendant may be convicted of a § 1005 charge if he or she conspires with or aids and abets a bank official's making of a false entry. See, e.g., Copple, 827 F.2d at 1186; Phillips, 406 F.2d at 601-02. Here, the evidence we have discussed in addressing Mr. Wittig's challenge to the conspiracy convictions provides sufficient support for the § 1005 convictions alleged in counts 2-4. The loan proposal, questionnaire responses, and personal financial statement addressed in those counts all failed to disclose the loan from Mr. Wittig to Mr. Weidner. Based on those omissions, a jury could reasonably conclude that the submission of each document was an overt act committed in furtherance of the conspiracy charged in count 1. Because the evidence is sufficient to support the conclusion that Mr. Wittig was a member of that conspiracy, a jury could properly convict him for the submission of the documents addressed in counts 2-4, even though he did not personally prepare those documents. See United States v. Russell, 963 F.2d 1320, 1322 (10th Cir. 1992) ("During the existence of a conspiracy, each member of the conspiracy is legally responsible for the crimes of fellow conspirators . . . that are committed in furtherance of the conspiracy.") (citing

Pinkerton v. United States, 328 U.S. 640, 646-49 (1946)).

c. statements alleged in count 2

Mr. Wittig also argues that, contrary to the allegations of count 2, the statements in the April 27, 2001 loan proposal were not false. He observes that the loan proposal stated one of the purposes of the $1.5 million increase in his line of credit was to "make business investments." Wittig App. at 524. According to Mr. Wittig, his $1.5 million loan to Mr. Weidner, on which he charged 7 percent interest, was such a "business investment," and thus the loan proposal did not contain a false statement.

But the policy underlying § 1005 is to ensure that an inspection of the bank's books will yield an accurate picture of its condition. Darby, 289 U.S. at 226; Cordell, 912 F.2d at 773. As a result, a material omission from a document may constitute a false entry. Cordell, 912 F.2d at 773 (stating that "an omission of material information relating to matters which should be disclosed in order to show a true picture of the transactions involved, as well as an actual misstatement, qualifies as a false entry under the statute"). Here, even though, in broad terms, one could arguably characterize Mr. Wittig's loan to Mr. Weidner as a "business investment," the proposal addressed in count 2 omitted a key material fact about the requested line of credit increase for Mr. Wittig–that it was really for Mr. Weidner, who wanted to use it for an investment that Mr. Wittig had expressly turned down. Thus, the government presented sufficient evidence of a false entry under § 1005.

d. count 5

Mr. Wittig addresses another sufficiency-of-the-evidence challenge directly at count 5, which concerns his January 8, 2002 financial statement. He argues that, for two reasons, the government failed to prove that he submitted that document with the intent to defraud the bank and that the evidence is therefore insufficient to support this particular § 1005 count.

First, Mr. Wittig observes, Mr. Weidner already knew about the $1.5 million loan he had received from Mr. Wittig. Thus, Mr. Wittig argues, the omission of that loan from Mr. Wittig's own financial statement merely demonstrates that he failed to disclose information that would have been pointless to disclose. Second, Mr. Wittig contends that when he submitted the financial statement, Ms. Gurney had already told the bank's chief lending officer about the loan to Mr. Weidner.

Again, we are not persuaded. Congress passed § 1005 to protect the integrity of the bank's records. See Darby, 289 U.S. at 226; Cordell, 912 F.2d at 773. Thus, the fact that a particular bank official, like Mr. Weidner, is aware of certain information not disclosed in a document does not foreclose a finding of the necessary intent to defraud. See Chaney, 964 F.2d at 449 (stating that "[t]he government need not prove intent to cause the bank injury; all that is required [under § 1005] is that the defendant intended to defraud one or more of the bank's officers, auditors, examiners, or agents" (emphasis added)). As to the fact that Ms. Gurney had disclosed the Wittig/Weidner loan to the bank's chief lending officer three months before Mr. Wittig filed his financial statement, we have previously noted that

there is no evidence that Mr. Wittig himself knew about that disclosure. Thus, despite Ms. Gurney's disclosure, the jury could still have reasonably concluded that Mr. Wittig's failure to list the loan *demonstrated the intend [sic] to defraud necessary to* support his § 1005 conviction as to count 5.

2. Mr. Weidner

Mr. Weidner challenges his convictions for the § 1005 violations alleged in counts 2 and 5—the April 27, 2001 loan proposal and Mr. Wittig's January 8, 2002 financial statement. He invokes his own testimony that he believed that the funds for the Arizona investment were to come from funds other than those in Mr. Wittig's Capital City accounts. That belief, he contends, demonstrates that he lacked an intent to defraud. Then, as to count 2, Mr. Weidner advances the same argument as Mr. Wittig—that it was proper to describe the purpose of the initial loan as "business investments." Wittig App. at 524.

Neither argument has merit. Even though Mr. Weidner testified that he did not intend to use Mr. Wittig's $1.5 million line of credit increase as the funding for the Arizona real estate investment, the jury was not required to believe him. As the district court explained, there was sufficient circumstantial evidence from which a reasonable juror could conclude that Mr. Weidner and Mr. Wittig did intend to use the $1.5 million line of credit increase for Mr. Weidner's real estate investment. In particular, the $1.5 million was deposited in Mr. Wittig's account and then on the same day transferred to the Arizona title company managing the real estate transactions in which Mr. Weidner wanted to invest. There is no indication that Mr. Wittig objected to that transfer,

and, on the following day, Mr. Weidner signed a promissory note obligating him to pay $1.5 million plus interest to Mr. Wittig.

As to the fact that the April 27, 2001 loan proposal referred to "business investments," id., we have already noted that, despite the use of that phrase, the failure to disclose that Mr. Weidner was the real borrower supports the jury's finding that Mr. Wittig possessed the necessary intent to defraud. The same is true of Mr. Weidner.

We therefore conclude that the evidence is sufficient to support Mr. Weidner's § 1005 convictions alleged in counts 2 and 5.

C. Sufficiency of Evidence Supporting § 1957 Money Laundering Convictions

Mr. Wittig and Mr. Weidner also challenge the sufficiency of the evidence supporting their money laundering convictions under 18 U.S.C. § 1957. Section 1957(a) prohibits "knowingly engag[ing] . . . in a monetary transaction in criminally derived property [that] is derived from specified unlawful activity." To establish a violation of § 1957, the government must prove that the defendant (1) engaged or attempted to engage, (2) in a monetary transaction, (3) in criminally-derived property, (4) knowing that the property was derived from unlawful activity, and (5) the property is, in fact, derived from specified unlawful activity. United States v. Massey, 48 F.3d 1560, 1565 (10th Cir. 1995).

"In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity." 18 U.S.C. § 1957(c). In other

words, "[t]he knowledge element of the offense requires that the defendant know that the property in question is 'criminally derived,' although it does not require knowledge that the property was derived from 'specified unlawful activity.'" United States v. Allen, 129 F.3d 1159, 1164 (10th Cir. 1997) (quoting United States v. Pettigrew, 77 F.3d 1500, 1513 (5th Cir. 1996)).

1. Mr. Wittig

Mr. Wittig's § 1957 money laundering conviction is based upon the wire transfer of funds from his Capital City account to the Arizona title company on April 30, 2001. In challenging the evidence supporting this conviction, Mr. Wittig advances arguments similar to those he offers in attacking his § 371 conspiracy conviction. Mr. Wittig argues that these funds were not "criminally derived" and that, in the alternative, there is no evidence that he knew that the funds were criminally derived.

We are not persuaded by Mr. Wittig's contentions. As the government notes, the evidence supporting the § 371 conspiracy and § 1005 convictions also supports the money laundering conviction. Because a jury could reasonably conclude that Mr. Wittig concealed the purpose of the line of credit increase he obtained from the bank, a jury could also conclude that the funds that were transferred by Mr. Wittig on April 30, 2001 were criminally derived. Accordingly, the evidence is sufficient to support Mr. Wittig's § 1957 money laundering conviction.

2. Mr. Weidner

Mr. Weidner also challenges his § 1957 money laundering conviction. His argument here is dependent on his challenge to the § 371 conspiracy

conviction and to the § 1005 conviction alleged in count 2. In particular, Mr. Weidner notes that a money laundering conviction requires an underlying criminal activity. Here, he contends, there was no underlying crime because there was no evidence from which a jury could conclude that, at the time the $1.5 million was transferred to the Arizona title company, he intended to conceal from bank officials the loan that he had obtained from Mr. Wittig.

Mr. Weidner's challenge lacks merit. Ms. Gurney testified that it was Mr. Weidner who instructed her how to complete the April 27, 2001 loan proposal. That proposal did not disclose that the $1.5 million increase in Mr. Wittig's line of credit was intended for Mr. Weidner's real estate investment in Arizona. Moreover, the $1.5 million that Mr. Wittig loaned to Mr. Weidner was not transferred directly to Mr. Weidner but instead was routed to the Arizona title company managing the transaction in which Mr. Weidner wanted to invest. Ms. Gurney testified that she did not make that transfer and that Mr. Weidner had the authority and the ability to make such a wire transfer himself. From the manner in which the $1.5 million was transferred from Mr. Wittig's account to Mr. Weidner's Arizona real estate investment, the jury could conclude that Mr. Weidner intended to conceal from bank officials that he was the real borrower of the $1.5 million advanced by Capital City Bank. Thus, the evidence was sufficient to support the jury's finding that Mr. Weidner knowingly engaged in a transaction involving criminally derived property in violation of § 1957.

D. Evidence of Mr. Wittig's Wealth and Executive Employment Agreement

Mr. Wittig challenges the district court's admission of exhibits 31 and 52, arguing that they were unduly prejudicial and that, as a result, he is entitled to a new trial. "We review a district court's evidentiary rulings for abuse of discretion." United States v. Curtis, 344 F.3d 1057, 1067 (10th Cir. 2003).

Under that standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." McEwen v. City of Norman, 926 F.2d 1539, 1553-54 (10th Cir. 1991) (internal quotation marks omitted). Our deference to the trial court is based upon its first-hand ability to view the witnesses and evidence and assess credibility and probative value. Id. at 1554. "An abuse of discretion occurs when the district court's decision is arbitrary, capricious, or whimsical, or results in a manifestly unreasonable judgment." Moothart v. Bell, 21 F.3d 1499, 1504-05 (10th Cir. 1994) (internal quotation marks omitted). Even "[i]f we find error in the admission of evidence, we will set aside a jury verdict only if the error prejudicially affects a substantial right of a party." Coletti v. Cudd Pressure Control, 165 F.3d 767, 776 (10th Cir. 1999) (internal quotation marks omitted).

The first document to which Mr. Wittig objects, exhibit 31, is an employment agreement between Western Resources and Mr. Wittig, dated September 19, 2000. At trial, the government contended that this agreement demonstrated that Mr. Wittig would greatly benefit from the creation of a new utility company and that, because Mr. Wittig was seeking

funding from Mr. Weidner's bank, the agreement supplied a motive for Mr. Wittig's allowing his line of credit to be used to provide the $1.5 million loan to Mr. Weidner.

The second document at issue, exhibit 51, is an overview of the benefits that would flow to executives in the new utility company. The government contended at trial that the document indicated that Mr. Wittig would receive between $37 million and $64 million. Again, the government asserted that the opportunity available to Mr. Wittig to receive these substantial sums explained why Mr. Wittig declined to invest in the Arizona real estate project himself and opted instead to curry favor with Mr. Weidner, whose bank would be able to finance the creation of the lucrative new utility company.

Mr. Wittig contends that both documents were irrelevant and prejudicial. According to Mr. Wittig, the government "trumpeted these documents in an attempt to prejudice the jury with arguments about a potential multimillion dollar payout scenario, bonuses, stock options, and split-dollar life insurance, as well as the value of the Wittigs' extensively renovated home in Topeka and a New York apartment they maintained." Wittig's Br. at 30.

Mr. Wittig further contends that the government failed to establish that he needed Mr. Weidner's assistance in obtaining financing for the new utility company. He points to evidence that the new utility company had great profit potential for the bank and that, as a result, Mr. Wittig did not need Mr. Weidner's help in obtaining the financing. Moreover, he notes, any decision with respect to the financing at issue would have been referred to a committee because Mr. Weidner lacked the authority to

personally approve it. Finally, Mr. Wittig observes that the proposed transaction creating the new utility never came to fruition.

To a degree, Mr. Wittig's points are well-taken. The government's quid pro quo theory involved a substantial amount of speculation and in fact was unnecessary to prove the counts against Mr. Wittig, which involved the loan to Mr. Weidner, not the creation of the new utility. Cf. Shively, 715 F.2d at 266 (noting, in a prosecution for conspiracy to misapply bank funds in violation of 18 U.S.C. §§ 371, 656, and 1014, that the motivation of a customer in loaning money to a bank official was irrelevant—"whether he did so out of pure friendship, or, as is more likely, to ingratiate himself with the officer of a bank with which he did business"). Moreover, even without the evidence of the potential benefits from the new utility company, the government introduced evidence that Mr. Wittig was benefitting from the loan to Mr. Weidner: Mr. Weidner was paying Mr. Wittig a higher interest rate than Mr. Wittig was paying the bank.

Nevertheless, we cannot conclude that the district court abused its discretion in admitting this evidence. The evidence of the lucrative benefits from the new utility company was of some relevance: it did indicate that Mr. Wittig had an interest in cultivating a good relationship with Mr. Weidner. The evidence invoked by Mr. Wittig does not foreclose the government's allegation that Mr. Wittig sought to cultivate Mr. Weidner's good will and that one way of obtaining that good will was to loan Mr. Weidner the $1.5 million. Moreover, Mr. Wittig has not established the necessary prejudice to warrant reversal of his conviction. See Coletti, 165 F.3d at 776 (noting "[i]f

[this court] find[s] error in the admission of evidence, [it] will set aside a jury verdict only if the error prejudicially affects a substantial right of a party" (internal quotation marks omitted)).

E. Jury Instruction Errors Alleged by Mr. Wittig

Mr. Wittig challenges the district court's jury instructions on three grounds. We review a district court's decision to give a particular jury instruction for an abuse of discretion. Osteguin v. S. Pac. Transp. Co., 144 F.3d 1293, 1295 (10th Cir. 1998). However, we review de novo whether, considering the instructions as a whole, the jury was misled. Wilson v. Muckala, 303 F.3d 1207, 1214 (10th Cir. 2002). "In reviewing such allegations, this court examines the record as a whole to determine whether the instructions state the applicable law and provide the jury with an appropriate understanding of the issues and the legal standards to apply." Faulkner v. Super Valu Stores, 3 F.3d 1419, 1424 (10th Cir. 1993).

1. Allowing a Bank Customer to Be Convicted of a § 1005 Violation

Mr. Wittig argues that the jury instructions allowed him to be convicted of the § 1005 violations based on a finding that he acted alone, solely as a bank customer. Again invoking the Third Circuit's decision in Barel, he maintains that the statute does not authorize prosecutions based on such a theory. Although Mr. Wittig acknowledges that the jury was also instructed that he could be convicted of the § 1005 violations on an aiding and abetting or a conspiracy theory, he contends that one cannot determine whether the jury relied on these theories or on the theory that he acted alone as a bank customer.

Mr. Wittig's challenge is based on the Supreme Court's decision in Yates v. United States, 354 U.S. 298 (1957), overruled on other grounds by Burks v. United States, 437 U.S. 1 (1978). In Yates, the Court held that a verdict must be set aside "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Id. at 312. In a subsequent decision, the Court limited that holding to instances in which one of the possible bases of conviction was legally insufficient as opposed to factually insufficient. See Griffin v. United States, 502 U.S. 46, 58-59 (1991) (discussing Yates).

Here, even assuming that Mr. Wittig is correct in arguing that a bank customer cannot be prosecuted for a direct violation of § 1005, he has not established that his § 1005 convictions are invalid. The jury was also instructed that Mr. Wittig could be liable for violating § 1005 as an aider or abettor or as a conspirator, and from a review of the instructions, evidence, and arguments of counsel, it is clear that it the jury relied on those theories in convicting Mr. Wittig of the § 1005 violations.

In particular, as to counts 2-4, the government, as Mr. Wittig himself contends, offered no evidence that Mr. Wittig submitted the documents at issue (the loan proposal, the questionnaire responses, and Mr. Weidner's financial statement). Thus, the only basis on which the jury could have found Mr. Wittig responsible for these violations was on an aiding and abetting or conspiracy theory.

As to count 5, the government alleged that Mr. Wittig's submission of his January 8, 2002 financial statement was an overt act carried out in furtherance of the conspiracy. The fact that the jury convicted

Mr. Weidner on that count demonstrates that it found that Mr. Wittig's overt act of submitting his own financial statement was done in furtherance of the conspiracy. There was no evidence that Mr. Weidner was involved in the preparation and submission of that document, and so a conspiracy theory is the only theory on which the jury could have relied in convicting Mr. Weidner of that count. Because the jury necessarily found that Mr. Wittig's submission of his own financial statement was done in furtherance of the conspiracy, there is no risk that the jury relied solely on the allegedly invalid theory that Mr. Wittig committed the violation alleged in count 5 by acting alone as a bank customer. See United States v. Hudgins, 120 F.3d 483, 488 n.3 (4th Cir. 1997) (noting that Yates "requires reversal only where it is impossible to tell that the bad ground was not the sole basis for the verdict" (emphasis added) (internal quotation marks omitted)).

2. Instructing on Pinkerton Conspiracy Theory

Mr. Wittig next challenges the district court's Pinkerton instruction insofar as it concerned count 5, the § 1005 false bank entry charge that addresses Mr. Wittig's submission of his own financial statement on January 8, 2002. Mr. Wittig argues that, as to that count, no conduct by Mr. Weidner was charged or argued. As a result, Mr. Wittig contends, the district court's Pinkerton instruction improperly allowed Mr. Wittig to be convicted for the conduct of a bank official.

Mr. Wittig's § 1005 conviction under count 5 was not based upon the Pinkerton doctrine. That doctrine provides that one conspirator can be found guilty of crimes committed by another conspirator in furtherance of the conspiracy. See Russell, 963 F.2d

at 1322. Here, it was Mr. Wittig, not his coconspirator, who committed the act alleged in count 5 by submitting his own financial statement. As we have noted, bank customers who conspire or aid and abet bank officials may be convicted under § 1005. See, e.g., Copple, 827 F.2d at 1186; Luke, 701 F.2d at 1108; Phillips, 406 F.2d at 601-02. Thus, there is no instructional error here.

3. Refusal to Give Instruction Regarding Third Party Loans

In a final challenge to the jury instructions, Mr. Wittig argues that the district court erred in refusing to give an instruction stating that "nominee loans" (loans on behalf of a third person) are not per se illegal.

We discern no grounds for reversal here. Viewed as a whole, the instructions properly focused the jury on the key issue–whether Mr. Wittig and Mr. Weidner misled Capital City Bank officials. As the government persuasively argues, to have given the jury a simple instruction that nominee loans are not per se illegal would have been an incomplete statement of the law: nominee loans are illegal when the borrower and bank officer make false statements or omit material information in order to obtain the funds. Whether the defendants made such statements and omitted such information was the issue contested here, and Mr. Wittig's per se instruction was not necessary to inform the jury of the relevant legal principles.

F. Allocation of Loan Proceeds in Determining Amount of Loss

1. Mr. Wittig's challenge

In the first of his challenges to his sentence, Mr. Wittig argues that the district court erred in applying the "gross receipts" provision of the Guidelines in determining the amount of loss and arriving at an offense level. His argument concerns the proper interpretation of the Guidelines, and we therefore engage in de novo review. United States v. Brown, 314 F.3d 1216, 1222 (10th Cir. 2003).

USSG § 2B1.1(b)(12) provides that:

> (Apply the greater) If—
>
> (A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels;
>
> (B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels.
>
> If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

The commentary to the Guidelines provides a definition of "gross receipts":

> Gross Receipts Enhancement Under Section (b)(12)(A)
>
> (A) In General -For purposes of subsection (b)(12)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually,

rather than to all participants, exceeded $1,000,000.

(B) Definition-"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).[1]

USSG § 2B1.1 cmt. n.9 (2001) (emphasis added).

At sentencing, the district court relied on § 2B1.1(b)(12) to conclude that, by receiving the $1.5 million increase in his line of credit before the funds were transferred to Mr. Weidner's real estate investment in Arizona, Mr. Wittig received gross receipts of more than $1 million.

Mr. Wittig now contends that the district court erred because it also attributed the same $1.5 million in receipts to Mr. Weidner. This double attribution, Mr. Wittig maintains, is inconsistent with the principle set forth in the Guideline commentary that, in order for the enhancement to level 24 to apply, "the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000." Id.

Mr. Wittig invokes a line of cases applying this Guideline provision and concluding that "no part of the amount found to have been derived by one defendant can be counted as having been derived by another defendant." United States v. Kohli, 110 F.3d 1475, 1477 (9th Cir. 1997); see also United States v. Castellano, 349 F.3d 483, 486 (7th Cir. 2003) (applying § 2B1.1(b)(12) and concluding that the

[1] That statute contains the same definition of "gross receipts."

defendant must receive proceeds "individually"); United States v. Nesenblatt, 171 F.3d 1227, 1229-30 (9th Cir. 1999) (same); United States v. Millar, 79 F.3d 338, 346 (2d Cir. 1996) (remanding "for factual findings to establish the amount of gross receipts [that the defendant] derived individually—not jointly").

In response, the government invokes a Third Circuit decision stating that "it is irrelevant how [the defendant] spent the money [i.e., "the gross receipts"] of the offense, once he obtained it." United States v. Bennett, 161 F.3d 171, 193 (3d Cir. 1998). Thus, the government's position is that Mr. Wittig himself received more than $1 million in gross receipts of the offense, and that the fact that Mr. Wittig chose to loan this money to Mr. Weidner is irrelevant.

In our view, the various decisions cited by Mr. Wittig and the government are distinguishable from the instant case in important respects. The decisions upon which Mr. Wittig relies do indicate that the same receipts cannot be counted against more than one defendant. However, unlike this case against Mr. Wittig and Mr. Weidner, none of these cases involved a series of offenses in which each defendant successively used the receipts in a separate fashion (with one defendant, Mr. Wittig, obtaining money from a bank and then earning interest by loaning that money to his codefendant Mr. Weidner, and the codefendant, Mr. Weidner, using the proceeds of the loan to profit from a real estate investment).

Conversely, the Third Circuit decision on which the government relies does not involve the attribution of the same receipts to codefendants or to the defendant and another person who somehow participated in the criminal scheme. In Bennett, the defendant argued

that he did not receive certain receipts of the offense of conviction "because he subsequently transferred much of the money to consultants and others who did work for [his company]." Id. In rejecting that argument, the Third Circuit did state that "it is irrelevant how [the defendant] spent the money after he obtained it." Id. However, there is no indication in the Third Circuit's opinion that the individuals to whom the defendant transferred the receipts were codefendants or otherwise participated in the criminal scheme. Thus, Bennett does not offer the government a way around the Guideline language stating that the sentencing court may consider "gross receipts to the defendant individually, rather than to all participants." USSG § 2B1.1 cmt. n.9 (2001) (emphasis added).

In light of the ambiguity of the Guideline language, the lack of case law resolving the issue of how to attribute receipts in these circumstances, and the lack of a persuasive argument from the government, we conclude that the district court erred in attributing the $1.5 million in gross receipts to both Mr. Wittig and Mr. Weidner. See Castellano, 349 F.3d at 486 (discussing § USSG 2B1.1(b)(12) and stating that "[n]othing in the Sentencing Guidelines specifies what it means to receive proceeds 'individually'"); United States v. Gay, 240 F.3d 1222, 1232 (10th Cir. 2001) ("The rule of lenity requires courts to interpret ambiguous statutes, including the Sentencing Guidelines, in favor of criminal defendants.").[2]

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[2] In its appellate brief, the government also argues that Mr. Wittig obtained additional gross receipts from the offenses. The government cites interest on the promissory note from Mr. Weidner (more than $90,000) as well as the two additional

Prior to the Supreme Court's decision in Booker, our conclusion that a Guideline provision was ambiguous required us to remand with instructions to follow the interpretation of the Guidelines that would produce the lesser sentence. See United States v. Bazile, 209 F.3d 1205, 1207 (10th Cir. 2001). Post-Booker, however, our approach is somewhat different. In particular, after Booker, the district courts are "[r]elieved of the mandatory application of the guidelines" and "are now permitted to give more sway in sentencing to the factors enumerated in 18 U.S.C. § 3553(a)." United States v. Resendiz-Patino, 420 F.3d 1177, 1184 n.6 (10th Cir. 2005).

The § 3553(a) factors include "the nature and circumstances of the offense." 18 U.S.C. § 3553(a)(1). In our view, the circumstances of these offenses include those noted by the government here—that Mr. Wittig and Mr. Weidner each used the $1.5 million from the line of credit increase in different ways and derived some benefit from it. Thus, the district court may properly consider this aspect of the offenses in resentencing under the post-Booker regime.

2. Mr. Weidner's challenge

Mr. Weidner makes only a cursory challenge to the gross receipts enhancement of his sentence. He argues that because the loan from Mr. Wittig arose out of "a legitimate borrower/lender relationship,"

$500,000 increases in his line of credit that Mr. Wittig obtained in May and June 2001. See Aple's Br. at 43. However, the district court did not rely on these transactions in determining the amount of gross receipts received by Mr. Wittig, and we decline to consider these transactions for the first time on appeal.

Wittig's Br. at 33, the $1.5 million was obtained from Mr. Wittig and not from "a financial institution," as required by USSG § 2B1.1(b)(12).

This argument merely restates Mr. Weidner's challenge to the sufficiency of the evidence. As we have noted, there was ample evidence from which the district court could conclude that the $1.5 million transferred to Mr. Weidner's Arizona real estate investment was funded by the $1.5 million increase in Mr. Wittig's line of credit. Thus, the district court properly concluded that the $1.5 million was obtained from a financial institution.

G. Significance of Collateral in Determining Amount of Loss

Mr. Wittig and Mr. Weidner also challenge the district court's determination of the amount of loss under an intended loss theory. They invoke the commentary to USSG § 2B1.1, which defines "[i]ntended loss" as:

> (I) . . . the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

USSG § 2B1.1 cmt. n.2(A)(ii) (2001).

Here, the district court found that both defendants intended a loss of $1.5 million. In reaching this conclusion, the court did not consider the value of the collateral that Mr. Wittig had pledged to secure his line of credit. The court reasoned that, when he had obtained the $1.5 million increase on April 30, 2001,

Mr. Wittig had pledged no new collateral, and that even considering the collateral that he had previously pledged for the line of credit, the amount was still below the loan-to-value ratio required by the bank. See Wittig App. at 2639-40; Weidner App. at 622.

Mr. Wittig and Mr. Weidner contend that the district court erred by not considering the fact that Mr. Wittig provided adequate collateral for the $1.5 million increase n his line of credit. They note that this circuit "has . . . required that the value of security given for a loan be taken into account in determining intended loss." United States v. Schild, 269 F.3d 1198, 1201 (10th Cir. 2001); see also United States v. Nichols, 229 F.3d 975, 980 (10th Cir. 2000) ("The security of [a] loan is a valid consideration in evaluating a defendant's realistic intent and the probability of inflicting the loss."). In response, the government has chosen not to argue in support of the district court's disregard of the collateral provided by Mr. Wittig, instead arguing only that the amount of loss determination is proper under the gross receipts approach that we have addressed above.

From a review of the record, we conclude that the district court did not adequately consider the amount of collateral provided by Mr. Wittig in determining the amount of loss under an intended loss theory. Although there are instances in which a district court may ignore collateral in determining intended loss, the court must first determine that the defendant intended to deprive the lender of its collateral. See United States v. Williams, 292 F.3d 681, 686 (10th Cir. 2002) (stating that "we have upheld a finding of intended loss of an entire loan amount where the record indicated the defendant intended to

permanently deprive the lender of security by concealing pledged collateral").

The district court did not make such findings. The facts noted by the district court—that Mr. Wittig provided no new collateral for the $1.5 million increase in his line of credit and that amount of collateral provided did not comport with the bank's rules—might justify the disregard of some of the collateral pledged. However, absent further explanation and findings, we cannot see how those facts justify a disregard of all the collateral pledged by Mr. Wittig in calculating the amount of intended loss.

Accordingly, we conclude that the district court also erred in calculating the amount of loss under the intended loss approach.

H. Booker Error

Mr. Wittig and Mr. Weidner both argue that their sentences are invalid under Booker. Because we have already concluded that the district court erred in applying the gross receipts and intended loss provisions of the Guidelines, we need not address this contention as to Mr. Wittig. See United States v. Cano-Silva, 402 F.3d 1031, 1039 (10th Cir. 2005) (stating that "we need not address any issues related to . . . Booker since we have already determined that the case must be remanded for resentencing"). Mr. Wittig is entitled to resentencing under the post-Booker regime. See Williams v. United States, 503 U.S. 193, 203 (1992) (stating that "once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless").

However, unlike Mr. Wittig, Mr. Weidner has not argued that the district court erred in attributing the $1.5 million to both defendants under the gross receipts theory of calculating the offense level. As the district court and the government have observed, the gross receipts theory provided an alternative to the intended loss approach in determining Mr. Weidner's base offense level. Thus, lacking a convincing challenge from Mr. Weidner to the district court's gross receipts determination, we must address his Booker claim.

Because Mr. Weidner did not raise this claim before the district court, he is only entitled to resentencing if he establishes that the mandatory application of the Guidelines was plain error. See Dazey, 403 F.3d at 1173. To establish plain error, Mr. Weidner must demonstrate that the district court (1) committed error, (2) that was plain, and (3) that affected his substantial rights. United States v. Cotton, 535 U.S. 625, 631 (2002); Dazey, 403 F.3d at 1174. If he makes this showing, then we must proceed to a fourth inquiry, asking whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Cotton, 535 U.S. at 631-32; Dazey, 403 F.3d at 1174.

Our post-Booker cases have distinguished between constitutional and nonconstitutional Booker error. See United States v. Gonzalez-Huerta, 403 F.3d 727, 731-32 (10th Cir. 2005). Here, the error alleged by Mr. Weidner is constitutional: the district court based its amount-of-loss determinations on facts not found by the jury. See Dazey, 403 F.3d at 1174 (noting that the district court committed constitutional Booker error because the sentencing judge relied on facts "found by a preponderance of the

evidence to increase [the defendant's] sentence beyond the maximum authorized by the facts established by the jury's verdict"). Because the error was constitutional, we apply a less stringent standard of plain error review. Id.

The first two parts of the plain error inquiry merit only brief discussion. The district court based Mr. Weidner's sentence on facts not found by the jury and therefore violated his Sixth Amendment rights under Booker. Thus, the court committed plain error. See id. at 1174-75.

As to the third part of the inquiry, we conclude that Mr. Weidner has established that the Booker error affected his substantial rights. The district court's finding as to the amount of loss was a key component of the sentencing decision, resulting in an increase in the offense level from six to twenty-four. Without the amount-of-loss findings, the Guideline range would have been six to twelve months, rather than seventy-eight to ninety-seven months. See USSG Ch. 5, pt. A (Sentencing Table) (2001). Moreover, Mr. Weidner contested the government's allegations. Cf. Dazey, 403 F.3d at 1177 (noting that, at sentencing, the defendant "strenuously contested the factual basis for the sentencing enhancements" and concluding as a result that he had established a reasonable probability of a different result absent the Booker error). Thus, there is a reasonable probability that a jury (charged with applying the beyond-a-reasonable-doubt standard to the determination of the amount of loss) would not have found either that $1.5 million in gross receipts was attributable to both Mr. Wittig and Mr. Weidner or that, as to each defendant, the intended loss was $1.5 million.

Finally, we conclude that Mr. Weidner has satisfied the fourth part of the inquiry—that the error affected the integrity, fairness, or public reputation of the proceedings. In Dazey, we set forth three justifications for exercising our discretion to correct a Booker error: (1) the error was constitutional, "which entails a less rigorous application of the plain error burden[;]" (2) "[the defendant] vigorously contested the judge-found facts that enhanced his sentence[;]" and (3) the judge-found facts substantially increased the defendant's sentence. Id. at 1178. As noted above, all three factors are present here. As in Dazey, "allowing a substantial increase in [a defendant's] sentence through the now-suspect practice of mandatory enhancements, based on judge-found facts, runs the risk of impugning the integrity and reputation of judicial proceedings." Id. at 1179.

Accordingly, we conclude that the plain error here warrants the exercise of our discretion to remand Mr. Weidner's case for resentencing under the post-Booker sentencing regime.

III. CONCLUSION

We AFFIRM the convictions of Mr. Wittig and Mr. Weidner. However, for the reasons set forth in this opinion, we VACATE the sentences of both defendants and REMAND the cases to the district court for resentencing in accordance with this opinion and with Booker.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed September 16, 2008]

No. 07-3051

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

DAVID C. WITTIG,
Defendant - Appellant.

ORDER

Before **HENRY**, Chief Judge, **KELLY**, **BRISCOE**, **LUCERO**, **MURPHY**, **HARTZ**, **O'BRIEN**, **McCONNELL**, **TYMKOVICH**, **GORSUCH**, and **HOLMES**, Circuit Judges.

This matter is before the court on appellant's petition for rehearing en banc. We also have a response from the United States. The request for en banc consideration was reviewed by the panel and transmitted to all the judges of the court who are in regular active service and not recused.* A poll was called. The majority voted to deny the request. Consequently, the petition is denied. Judges Hartz, O'Brien, McConnell, Tymkovich and Holmes would grant rehearing en banc.

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* The Honorable Deanell R. Tacha is recused in this matter and did not participate in the poll on en banc rehearing.

Entered for the court.

s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER
Clerk of Court

UNITED STATES CODE

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART II—CRIMINAL PROCEDURE

CHAPTER 227—SENTENCES

SUBCHAPTER A—GENERAL PROVISIONS

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

[Sections 3553(b)-(f) have been omitted.]

No. 08-779

In the Supreme Court of the United States

DAVID C. WITTIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals should have engaged in closer review of petitioner's above-Guidelines sentence to determine whether it was reasonable.

2. Whether petitioner's sentence was unreasonable because the district court relied in part on the need to avoid unwarranted disparity with the sentence imposed on petitioner's co-defendant.

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In the Supreme Court of the United States

No. 08-779

DAVID C. WITTIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 528 F.3d 1280. A prior opinion of the court of appeals (Pet. App. 87a-137a) is reported at 437 F.3d 1023. Another prior opinion of the court of appeals (Pet. App. 71a-86a) is not published in the Federal Reporter but is reprinted in 206 Fed. Appx. 763. The opinion of the district court regarding petitioner's sentence (Pet. App. 19a-70a) is reported at 474 F. Supp. 2d 1215.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2008. A petition for rehearing was denied on September 16, 2008 (Pet. App. 138a-139a). The petition for a writ of certiorari was filed on December 15, 2008.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted on one count of conspiring to submit false entries to a federally insured bank and to commit money laundering, in violation of 18 U.S.C. 371; four counts of making false entries in bank records, in violation of 18 U.S.C. 1005; and one count of money laundering, in violation of 18 U.S.C. 1957. He was sentenced to 51 months of imprisonment. The court of appeals affirmed the convictions but vacated the sentence and remanded for resentencing. Pet. App. 87a-137a. On remand, the district court sentenced petitioner to a prison term of 60 months. The court of appeals again vacated the sentence and remanded for resentencing. *Id.* at 71a-86a. On remand, the district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2a. The court of appeals affirmed the sentence of imprisonment, but reversed one condition of supervised release. *Id.* at 1a-18a.

1. Petitioner was the chairman of the board, president, and chief executive officer of the largest electric utility in Kansas. In 2001, he had a $3.5 million line of credit at Capital City Bank in Topeka. Petitioner agreed to loan bank president Clinton Weidner $1.5 million to invest in an Arizona real estate venture. Petitioner signed an agreement stating that his line of credit would be increased to $5 million, but he crossed out that figure and replaced it with $6 million. Petitioner then faxed the signed agreement to the bank. Later that day, $1.5 million was deposited in petitioner's account and then transferred to the company managing the Arizona

real estate transaction. Petitioner obtained two additional $500,000 increases in his line of credit within the next few months, and he also received $97,000 in profit on the loan, based on the difference between the interest he paid to the bank and the interest he charged Weidner. Petitioner and Weidner concealed the loan from the bank by filing false documents. In January 2002, petitioner submitted an annual financial statement, as required by the terms of his credit agreement with the bank, but he failed to disclose the loan to Weidner in the statement of his assets and liabilities. Pet. App. 2a-3a & n.1, 72a-74a, 89a-94a, 103a-108a, 113a; Gov't C.A. Br. 2-5.

2. A federal grand jury in the District of Kansas returned an indictment charging petitioner with one count of conspiracy, in violation of 18 U.S.C. 371; four counts of making false bank entries, in violation of 18 U.S.C. 1005; and one count of money laundering, in violation of 18 U.S.C. 1957. After a jury trial, petitioner was found guilty on all six counts. Pet. App. 74a.

In February 2004, the district court sentenced petitioner pursuant to the then-mandatory Sentencing Guidelines. The court determined that petitioner's Guidelines sentencing range was 51-63 months and sentenced him to 51 months of imprisonment. Pet. App. 3a.

The court of appeals affirmed petitioner's convictions, but vacated his sentence and remanded for resentencing. Pet. App. 87a-137a. The court held that the district court erred in applying a 16-level Guidelines enhancement based on a finding that the intended loss was more than $1 million, see Sentencing Guidelines § 2B1.1(b)(1)(I), and an additional two-level enhancement based on a finding that petitioner derived more than $1 million in gross receipts from a financial institu-

tion, see *id.* § 2B1.1(b)(12)(A) (2001). Pet. App. 127a-134a. The court of appeals remanded for the district court to recalculate petitioner's Guidelines range and to resentence him treating the Guidelines as advisory under *United States* v. *Booker*, 543 U.S. 220 (2005), which had been decided while his appeal was pending. Pet. App. 89a, 137a.

3. On remand, the district court again used the intended loss and gross receipts enhancements to calculate petitioner's Guidelines range. Pet. App. 4a. After considering the factors in 18 U.S.C. 3553(a), the court sentenced petitioner to 60 months of imprisonment, indicating that the sentence would be appropriate even if the intended loss and gross receipts enhancements did not apply. Pet. App. 5a.

The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 71a-86a. The court again held that the district court had erred in increasing petitioner's base offense level of six, explaining that petitioner's "Guidelines sentencing range was 0 to 6 months, well below his actual sentence of 60 months." *Id.* at 81a-83a. The court of appeals rejected the government's argument that any error in the Guidelines calculation was harmless, concluding that the district court had provided an insufficient explanation for the "dramatic variance" from the Guidelines range. *Id.* at 83a-85a.

4. On remand, the district court recognized that the court of appeals had "ruled that the applicable guideline range in this case is zero to six months." 2/5/07 Sent. Tr. 52; see Pet. App. 40a. After considering the factors in 18 U.S.C. 3553(a), the court sentenced petitioner to 24 months of imprisonment. 2/5/07 Sent. Tr. 61, 105. The court identified several circumstances that justified the

variance, including that petitioner "intended to profit" from a fraudulent scheme involving a financial institution and that he in fact benefitted from the scheme by increasing his line of credit at the bank and collecting interest from Weidner. *Id.* at 65-66; Pet. App. 59a-61a.

The court also considered the need to avoid "unwarranted sentence disparities among the defendants with similar records who have been found guilty of similar conduct." 2/5/07 Sent. Tr. 68; Pet. App. 61a (quoting 18 U.S.C. 3553(a)(6)). The court noted that the Guidelines sentencing range for a defendant convicted of a fraudulent scheme involving $1.5 million would ordinarily be at least 41 to 51 months. 2/5/07 Sent. Tr. 69; Pet. App. 61a. In addition, the court found "substantial similarities" between petitioner's conduct and that of his co-defendant Weidner, who received a 60-month sentence, including that both men "purposely made a profit" from the fraudulent loan transaction and then filed documents with the bank that failed to disclose the loan. 2/5/07 Sent. Tr. 69-72; Pet. App. 61a-63a. The court also recognized "dissimilarities," including that Weidner was a bank fiduciary and testified falsely at sentencing hearing. *Id.* at 63a.

Finally, the court gave "significant weight" to the need for the sentence to provide general and specific deterrence. Pet. App. 64a-65a. The court found that petitioner's failure to acknowledge any responsibility for his conduct and his violation of a court order by transferring financial assets while on release pending appeal demonstrated that he would not be deterred by a sentence within the Guidelines range. The court also concluded that a within-Guidelines sentence would not deter "other bank customers who might be inclined to engage

in such criminal conduct." 2/5/07 Sent. Tr. 73-75; Pet. App. 64a-65a.

5. The court of appeals affirmed the district court's imposition of a 24-month prison term, holding that the sentence was both procedurally and substantively reasonable.[1] Pet. App. 1a-18a. The court rejected petitioner's claim that the district court erred in considering the need to avoid unwarranted disparity between petitioner's sentence and that of his co-defendant. *Id.* at 10a ("'co-defendant disparity is not a per se 'improper' factor' post-*Gall* [v. *United States*, 128 S. Ct. 586 (2007)]") (quoting *United States* v. *Smart*, 518 F.3d 800, 804 (10th Cir. 2008)). Under the deferential standard of review adopted by this Court in *Gall*, the court found "no abuse of discretion" in the district court's sentencing decision. Pet. App. 10a-11a.

Judge Hartz concurred in a separate opinion that was joined by the other two members of the panel. Pet. App. 17a-18a. Judge Hartz disagreed with the Tenth Circuit's "recent jurisprudence regarding substantive reasonableness of sentences." *Id.* at 17a. In his view, a "significant variance" from the Guidelines range "should be considered unreasonable if it can be justified only by disagreement with the general views of other judges." *Id.* at 18a.

ARGUMENT

1. Petitioner contends (Pet. 1-3, 11-21) that this Court should grant review to resolve "confusion amongst the courts of appeals regarding the permissible

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[1] The court of appeals reversed a supervised release condition that prohibited petitioner from being employed as an executive or engaging in financial agreements or negotiations in a professional capacity without first obtaining court approval. Pet. App. 11a-16a.

scope of reasonableness review when an anomalous sentence is imposed in a mine-run case based on the district court's idiosyncratic views." The decision below is correct; it does not conflict with any decision of any other court of appeals; and this case is not a suitable vehicle to resolve the question presented because the sentencing court did not rely on its "idiosyncratic views" to impose a variant sentence in a "mine-run case." This Court's review is therefore unwarranted.

In *Gall* v. *United States*, 128 S. Ct. 586 (2007), the Court held that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Id.* at 591. In reviewing a non-Guidelines sentence, the appellate court "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 597. As petitioner notes (Pet. 1-2, 13), this Court has left open whether "closer review may be in order" on appeal "when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine- run case." *Kimbrough* v. *United States*, 128 S. Ct. 558, 575 (2007) (quoting *Rita* v. *United States*, 127 S. Ct. 2456, 2465 (2007)). That issue is not presented here, however, because the district court did not base its variance "solely" on a conclusion that the Guidelines sentencing range failed to satisfy the Section 3553(a) factors in a "mine-run case." Instead, the court identified particular facts and circumstances that placed petitioner's case outside the mine run of bank fraud cases for which the Guidelines recommended a sentence of 0 to 6 months of imprisonment. See Pet. App. 8a (district court "con-

cluded the guidelines did not adequately account for the specific circumstances of the case"); *id.* at 56a-57a (court "focuse[d] on facts particular to" petitioner); *id.* at 66a (factors court relied on were "not commonplace, but instead particular to" petitioner); 2/5/07 Sent. Tr. 68 (emphasizing importance of avoiding unwarranted disparity, "given the individual and particularized circumstances of this case"); *id.* at 73-74 (need for sentence to afford deterrence was "significant" in light of "individual factors and particularized circumstances of this case"). The court identified a number of factors that distinguished petitioner from other defendants who were subject to a minimal sentence under the Guidelines, including his participation in a $1.5 million bank fraud, his failure to acknowledge responsibility for the crime, and his transfer of assets in violation of a court order. 2/5/07 Sent. Tr. 65-66, 70-71, 74; Pet. App. 59a-60a, 65a.

In short, the district court based the variance on "uncommon * * * facts" for which petitioner's Guidelines range did not "adequately account." 2/5/07 Sent. Tr. 62-63, 76; Pet. App. 57a, 66a. As this Court explained in *Kimbrough*, "a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'" 128 S. Ct. at 574-575 (quoting *Rita*, 127 S. Ct. at 2465); see *Gall*, 128 S. Ct. at 597-598 ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.") (quoting *Rita*, 127 S. Ct. at 2469). The court of appeals correctly gave "due deference" to the district court's determination that the Section

3553(a) factors justified petitioner's 24-month sentence. Pet. App. 10a-11a (quoting *Smart*, 518 F.3d at 808).

Petitioner seizes on the district court's statement that an upward variance was "necessary to afford adequate deterrence to bank customers who are aiders and abettors to nominee loans with bank officers," Pet. App. 64a-65a, claiming (Pet. 15) that the court improperly relied on its own "personal view" in issuing a "categorical rule" that was "not tied to the particular facts of *this* case or *this* defendant." As explained above, however, the district court based its decision to vary primarily on circumstances that were specific to petitioner's case. But even if petitioner's account of the district court's sentencing rationale were accurate, this Court has made clear that sentencing courts "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough*, 128 S. Ct. at 570 (brackets in original) (quoting U.S. Br. at 16); see *Spears* v. *United States*, 129 S. Ct. 840, 843-844 (2009) (per curiam) ("district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines"); *Rita*, 127 S. Ct. at 2465 (district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations").

Contrary to petitioner's contention (Pet. 1-2, 11-21), there is no disagreement among the courts of appeals about whether sentencing courts are required to base variances from the Guidelines range "on factors unique to the defendant or offense rather than on personal disagreement with Guidelines policies." Pet. 11. In *United States* v. *Ofray-Campos*, 534 F.3d 1, cert. denied, 129 S. Ct. 588 (2008), and 129 S. Ct. 999 (2009), the First Circuit held that case-specific factors cited by the district

court—the defendant's possession of "powerful weapons" as a "triggerman" and his involvement with violence in connection with drug activity—did not justify a sentence at the statutory maximum. *Id.* at 42-44. The court said nothing about the permissibility of a variance based on a disagreement with Guidelines policy. *Ibid.* The other First Circuit decision petitioner cites, *United States* v. *Martin*, 520 F.3d 87, 96 (2008), affirmed a below-Guidelines sentence, noting that *Kimbrough* "opened the door for a sentencing court to deviate from the guidelines in an individual case even though that deviation seemingly contravenes a broad policy pronouncement of the Sentencing Commission." Subsequent decisions of the First Circuit have reaffirmed that "district judges may deviate from the guidelines even on the basis of categorical policy disagreements with its now-advisory provisions." *United States* v. *Boardman*, 528 F.3d 86, 87 (2008); see *United States* v. *Vanvliet*, 542 F.3d 259, 271 (2008) (same). In *United States* v. *Levinson*, 543 F.3d 190, 199-202 (2008), the Third Circuit vacated and remanded a below-Guidelines sentence, holding that the district court had relied on a clearly erroneous factual finding and provided an inadequate explanation for the variance. The Third Circuit also suggested that a sentencing court, rather than "stat[ing] its own general sentencing policies in contravention of the Guidelines," "must explain why the general policy should not apply in the particular case before it," *id.* at 199-201 & n.8 (citing *United States* v. *Gunter*, 527 F.3d 282, 286 (3d Cir. 2008), petition for cert. pending, No. 08-8109 (Dec. 23, 2008)), but this Court rejected that view in *Spears*. 129 S. Ct. at 845 (error in *Gunter* is "evident"). Finally, petitioner places "particular" reliance (Pet. 19-20) on the Sixth Circuit's decision in *United*

States v. *Funk*, 534 F.3d 522, reh'g en banc granted and opinion vacated (6th Cir. Dec. 18, 2008) (No. 05-3708), but that decision has been vacated on the granting of rehearing en banc.[2]

2. Petitioner also contends (Pet. 3-4, 21-27) that 18 U.S.C. 3553(a)(6), which directs sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," does not authorize consideration of potential disparity between sentences imposed on co-defendants. Contrary to petitioner's claim (Pet. 27), this Court made clear in *Gall* that Section 3553(a)(6) does not merely "direct[] district courts to avoid unwarranted nationwide disparities," but also permits consideration of disparity among co-defendants' sentences. In affirming the below-Guidelines sentence in *Gall*, the Court rejected the government's argument that the district court "failing to consider whether a sentence of probation would create unwarranted disparities, as required by § 3553(a)(6)." 128 S. Ct. at 598. Citing the district court's discussion with the prosecutor about the sentences imposed on two of Gall's co-defendants and the co-defendants' participation in the conspiracy, the Court found that "the judge gave specific attention to the issue of disparity when he inquired about the sentences already imposed by a different judge on two of Gall's codefendants," *id.* at 599, and took

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[2] Nor is substantive reasonableness review an "empty gesture" in the Tenth Circuit, as petitioner contends. Pet. 13 (quoting Pet. App. 17a). See *United States* v. *Friedman*, 554 F.3d 1301, 1308 (2009) ("even given the highly deferential abuse-of-discretion standard of review," 57-month sentence for defendant who had "an extraordinary record as a recidivist bank robber and general criminal" was substantively unreasonable).

into account both the "need to avoid unwarranted disparities" and "the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated." *Id.* at 600. The district court in this case properly compared the circumstances of petitioner's case with those of his co-defendant's case in imposing a sentence that accounted for both the "substantial similarities" and "dissimilarities" in their records and criminal conduct. 2/5/07 Sent. Tr. 69-73; Pet. App. 61a-64a.

Petitioner cites (Pet. 3, 22) pre-*Gall* decisions noting that courts of appeals had taken different positions on whether Section 3553(a)(6) authorized consideration of sentencing disparities among co-defendants, see *United States* v. *Wills*, 476 F.3d 103, 109 n.5 (2d Cir. 2007), but whatever disagreement previously existed was resolved by *Gall*. As petitioner notes (Pet. 4, 23), the Seventh Circuit has stated that it "will only disturb a sentence based on an unjustifiable disparity between co-defendants . . . if it actually creates a disparity between the length of the appellant defendant's sentence and all other similar sentences imposed *nationwide*." *United States* v. *Omole*, 523 F.3d 691, 700 (2008) (internal quotation marks omitted). But the *Omole* court made that statement in rejecting a defendant's claim that his within-Guidelines sentence was unreasonable, and the court did not suggest that it would be error for a district court to consider disparity among co-defendants' sentences. *Ibid.*; see *United States* v. *Smith*, 510 F.3d 603, 609-610 (6th Cir. 2007) (affirming within-Guidelines sentence and rejecting claim that sentencing court's discretion was limited by "the most lenient sentence that another court had imposed for a similar crime"), cert. denied, 128 S. Ct. 1910 (2008). The only other post-*Gall* decision petitioner cites as contrary to the decision be-

low is non-precedential. See *United States* v. *Vidal*, 275 Fed. Appx. 873, 878 (11th Cir. 2008). The court there concluded that the defendant's above-Guidelines sentence was reasonable, explaining that "[t]he fact that some of Vidal's codefendants received shorter sentences than he did does not mandate a different result." As the Sixth Circuit has explained, while a district judge is not required to consider disparity between co-defendants' sentences, the judge "*may* exercise his or her discretion and determine a defendant's sentence in light of a co-defendant's sentence." *United States* v. *Presley*, 547 F.3d 625, 632 (2008) (quoting *United States* v. *Simmons*, 501 F.3d 620, 623 (6th Cir. 2007)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2009

Supreme Court, U.S.
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No. 08-779

IN THE

Supreme Court of the United States

DAVID C. WITTIG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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IN THE

Supreme Court of the United States

No. 08-779

DAVID C. WITTIG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Mr. Wittig's petition squarely presents the question whether "closer review" is warranted when a district court varies from the Guidelines based on idiosyncratic policy views in a mine-run case. Indeed, that question was the sole subject of the unanimous concurrence to the Tenth Circuit's opinion, with all three panel members also voting in favor of en banc reconsideration of Mr. Wittig's appeal. App. 17a-18a (Hartz, J., concurring); App. 138a. As the United States acknowledges in its brief in opposition, this question was left open by the Court in *Kimbrough* v. *United States*, Br. Opp'n 7 (citing 128 S.Ct. 558, 575

(2007)); and it persists in causing confusion in the courts of appeals, which conflict over the appropriate scope of appellate review in this circumstance. See Pet. 13-21.

The Court's decision this term in *Spears* v. *United States*, ___U.S.___, 129 S.Ct. 840 (2009) (*per curiam*), addressed the permissibility of policy disagreements solely regarding the controversial crack-cocaine ratio and did not, as the United States erroneously suggests, Br. Opp'n 9, resolve the proper scope of appellate review when district judges base sentencing decisions on idiosyncratic views in other types of mine-run cases. See *Spears*, 129 S.Ct., at 843-844.

Nor did *Gall* resolve the conflict over the proper meaning of 18 U.S.C. §3553(a)(6) regarding codefendant sentencing disparities. Br. Opp'n 11-12. The United States fails to address, much less dispute, that, even within courts of appeals that permit consideration of such disparities, some look to distinct subsections of 18 U.S.C. §3553(a), leaving unresolved the proper construction of §3553(a)(6), the subsection invoked by the district court in Mr. Wittig's case and the provision that the Seventh and Eleventh Circuits properly have interpreted as limited to nationwide disparities, not disparities between codefendants.

To resolve confusion among the courts of appeals over both of the important and unresolved federal questions presented, the Court should grant Mr. Wittig's petition.

I. MR. WITTIG'S PETITION PROVIDES A COMPELLING VEHICLE TO RESOLVE ENDURING CONFLICTS AMONG THE COURTS OF APPEALS OVER TWO IMPORTANT AND UNRESOLVED QUESTIONS.

A. The District Court Quadrupled the Maximum Advisory Guidelines Sentence for Mr. Wittig Based on Idiosyncratic Views of This Mine-Run Case.

Contrary to the United States's assertion that the "closer review" issue from *Kimbrough* "is not presented here," Br. Opp'n 7, Mr. Wittig's case provides a compelling vehicle for the Court to resolve this important question. Although the district court recited facts it characterized as "particular" to Mr. Wittig in support of its upward variance, App. 66a, not one "placed petitioner's case outside the mine run of bank fraud cases for which the Guidelines recommended a sentence of 0 to 6 months of imprisonment," Br. Opp'n 7, as the United States erroneously contends.

For example, the United States highlights the district court's reliance on the amount of money involved, $1.5 million, as a factor justifying an increased sentence. Br. Opp'n 8. But this amount cannot render Mr. Wittig an unusually egregious bank-fraud defendant because the $1.5 million extension of his line of credit was fully collateralized, and there was no actual or intended loss. See, *e.g.*, App. 82a; Pet. 6-7, 14. Mr. Wittig's bank-fraud conviction is "uncommon," App. 66a, if anything, for the total absence of risk or loss to the financial institution. Moreover, to the extent the district court found that Mr. Wittig "intended to profit" from the offense, Br. Opp'n 5, that would be typical of

financial-fraud defendants.[1] The district court cited no other aspect of the offense that would place it "outside the mine run of bank fraud cases." Br. Opp'n 7.

The district court did emphasize that Mr. Wittig "has never acknowledged any responsibility," requiring the government to "continually meet its burden of proof." App. 65a; see Br. Opp'n 8. But Mr. Wittig's exercise of his constitutional right to a jury trial and his successful appellate challenges to the district court's sentencing and resentencing errors cannot afford grounds to sentence him to four times the maximum advisory guidelines sentence contemplated for the heartland of bank-fraud defendants. See also App. 103a (noting, in affirming Mr. Wittig's conviction, that "the sufficiency of the evidence against Mr. Wittig presents a close issue"). Nor does the "transfer of assets" highlighted by the United States remove this case from the mine run. Br. Opp'n 8. That independently lawful financial transaction concerned payment of attorneys' fees. See Tr. of Re-Sentencing Hr'g 99-104 (Feb. 5, 2007). It was never concealed but, nonetheless, was deemed to violate financial restrictions in Mr. Wittig's conditions of release, resulting in revocation of his bond.[2] That post-

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[1] The United States erroneously states that Mr. Wittig "received $97,000 in *profit* on the loan," Br. Opp'n 3 (emphasis added), but that was the gross amount of interest paid to Mr. Wittig by his codefendant based on a rate of 7%. App. 73a. Mr. Wittig's "profit" was far less: the difference between that 7% interest and the 5.39% interest he paid in full to the bank. *Ibid.*

[2] The district court subsequently released Mr. Wittig on bond again following the Tenth Circuit's reversal of the second sentencing decision. App. 7a, n.7. But, following the Tenth Circuit's latest opinion, the district court denied Mr. Wittig's motion to continue his release pending resolution of this petition, and he reported back to prison on January 7, 2009.

conviction, bond-related fact does nothing to place Mr. Wittig or his conviction outside the mine-run of bank-fraud cases.

As the Tenth Circuit panel observed in the unanimous concurrence below, that court's jurisprudence does not permit closer appellate review of variances in mine-run cases and thus cannot ensure that "the length of time that a defendant is deprived of liberty does not depend primarily and significantly on who the sentencing judge happens to be." App. 18a (Hartz, J., concurring) (advocating reversal when "the sentencing judge has an idiosyncratic view of the seriousness of the offense, the significance of the defendant's criminal history and personal qualities, or the role of incarceration in the criminal-justice system"). The question of "closer review" in mine-run cases was thoughtfully analyzed in Mr. Wittig's appeal, in which five judges on the Tenth Circuit voted to rehear the case en banc, including all three panel members. App. 138a. The Court should grant Mr. Wittig's petition to resolve this squarely presented, important question.

B. The Courts of Appeals Conflict Regarding Appellate Review of Idiosyncratic Variances in Mine-Run Cases and the Proper Construction of 18 U.S.C. §3553(a)(6).

Although the United States contends that this Court's recent sentencing decisions have already resolved both questions presented in Mr. Wittig's petition, confusion and conflicts in the courts of appeals endure.[3] Neither *Kimbrough* nor *Spears*

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[3] On February 23, 2009, a petition for writ of certiorari was filed in *Cavera* v. *United States*, No. 08-1081, seeking review of

determined the permissibility of "closer review" of idiosyncratic sentencing decisions in mine-run cases outside the crack-cocaine context. Br. Opp'n 9. Nor did *Gall* resolve disagreement over the proper construction of 18 U.S.C. §3553(a)(6) as applied to codefendants. Br. Opp'n 11-12. Because both important questions warrant the Court's attention, the Court should grant Mr. Wittig's petition.

Regarding variances, *Spears* confirmed only that district courts may categorically disagree with Sentencing Commission policy regarding the controversial 100:1 ratio for crack and powder cocaine. 129 S.Ct., at 843-844 ("[W]e now clarify that district courts are entitled to reject and vary categorically from the *crack-cocaine Guidelines* based on a policy disagreement with *those* Guidelines." (emphasis added)). Elsewhere, the Court has "preserved a key role for the Sentencing Commission," *Kimbrough*, 128 S.Ct., at 574, leaving open whether "closer review" is appropriate when a district court concludes that Guidelines policy "fails properly to reflect §3553(a) considerations even in a mine-run case." *Id.*, at 575 (internal quotation marks omitted); Br. Opp'n 7. Indeed, the Court noted in *Spears* that in *Kimbrough* "[t]he implication was that an 'inside the heartland' departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a 'categorical basis') may be entitled to less respect." 129 U.S., at 843. Accordingly,

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the Second Circuit's en banc opinion, *United States* v. *Cavera*, 550 F.3d 180 (CA2 2008) (en banc). As noted in Mr. Wittig's petition, Judge Sotomayor's partial dissent in *Cavera* protested the majority's failure to examine the "closer review" contemplated by *Kimbrough*, Pet. 20, n.6, and that issue is raised in Mr. Cavera's petition for writ of certiorari.

some courts have noted that *Spears* did not cabin appellate review of "inside the heartland departure[s]" other than in the crack-cocaine context. *E.g.*, *United States* v. *Barron*, __F.3d__, No. 08-1613, 2009 WL 538382, at *4 (CA8 Mar. 5, 2009) (observing, post-*Spears*, that "[t]he Court has been equivocal about whether . . . closer appellate review is warranted" when the Commission acts in its "characteristic institutional role" (internal quotation marks omitted)); see *United States* v. *Johnson*, 553 F.3d 990, 996 (CA6 2009) (expressing "no opinion on whether the principles articulated in *Spears* may apply outside the crack-cocaine context").

In the Tenth Circuit, however, in which substantive-reasonableness review already has become an "empty gesture," App. 17a (Hartz, J., concurring), *Spears* has been construed broadly: "In a series of ceremonial rites the leveling forces of the guidelines, their hearthstone, were sacrificed on the altar of sentencing discretion and appellate courts rendered impotent." *United States* v. *Flanders*, No. 08-6056, 2009 WL 405846, at *1 (CA10 Feb. 19, 2009) (unpublished) (O'Brien, J., concurring) (cursory affirmance of variance in bank-fraud case).[4]

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[4] The United States suggests in a footnote that substantive-reasonableness review remains alive in the Tenth Circuit, Br. Opp'n 11, n.2 (citing *United States* v. *Friedman*, 554 F.3d 1301 (CA10 2009)). But *Friedman* involved a downward variance without any discussion or justification by the district court for not treating a "recidivist bank robber" with an "extraordinary record" as a career offender and without any disagreement by the district court with the career-offender guideline on policy grounds. 554 F.3d, at 1308, n.10, 1311 & n.13, 1312. Given that "undeniably sparse record," the Tenth Circuit reversed and remanded without comment on the hypothetical permissibility of a policy disagreement in that case. *Ibid.*

Although the Ninth Circuit, like the Tenth Circuit, treats substantive-reasonableness review as a "rubber-stamp," *United States* v. *Ruff*, 535 F.3d 999, 1005 (CA9 2008) (Gould, J., dissenting), the First, Third, and Sixth Circuits, as the petition established, conduct meaningful appellate review. Pet. 16-21. The United States cites two First Circuit cases it suggests uniformly condone policy disagreements outside the crack-cocaine context, see Br. Opp'n 10, but both involved remands for reconsideration in light of *Kimbrough*, not abdications of appellate review when district courts impose idiosyncratic sentences. *United States* v. *Vanvliet*, 542 F.3d 259, 271 (CA1 2008); *United States* v. *Boardman*, 528 F.3d 86, 87-88 (CA1 2008); see Pet. 17-18. Similarly, although the United States contends that *United States* v. *Ofray-Campos* "said nothing about the permissibility of a variance based on a disagreement with Guidelines policy," Br. Opp'n 10 (citing 534 F.3d 1 (CA1 2008), cert. denied, 129 S.Ct. 588 (2008), and 129 S.Ct. 999 (2009)), inside-the-heartland variances, such as the "triggerman" variance vacated in *Ofray-Campos*, are "necessarily based on a policy disagreement with the Guidelines," *Spears*, 129 S.Ct., at 843, and they nonetheless receive careful scrutiny in the First Circuit. See 534 F.3d, at 43.

Nor did the First Circuit, in *United States* v. *Martin*, read *Kimbrough* as having "opened the door" to categorical disagreements with the Guidelines in all contexts. See Br. Opp'n 10 (quoting 520 F.3d 87, 96 (CA1 2008)). The very sentence from *Martin* that the United States quotes contemplates guidelines deviations "in an *individual* case." Br. Opp'n 10 (quoting 520 F.3d 87, 96 (CA1 2008) (emphasis added)); see also *Martin*, 520 F.3d, at 96 ("Here the district court grounded the defendant's sentence in

case-specific considerations, which is the accepted practice in the post-*Gall* world." (emphasis added)). *Martin* therefore reflects that circuit's practice of demanding that "the sentencing court ma[k]e plain just how this defendant stood out from the mine-run of criminal defendants" for that is "what matters most." 520 F.3d, at 95.

The Third Circuit, likewise, meaningfully reviews variances in mine-run cases. See Pet. 17-18. Although *Spears* ended the Third Circuit's practice in crack-cocaine cases, 129 S.Ct., at 845 (criticizing *United States* v. *Gunter*, 527 F.3d 282, 286 (CA3 2008), petition for cert. filed (U.S. Dec. 23, 2008) (No. 08-8109)), *Spears* did not, as the United States suggests, "reject[ ]" the holding of *United States* v. *Levinson*, 543 F.3d 190, 199-202 (CA3 2008), Br. Opp'n 10, a case arising outside that context. 129 S.Ct., at 843-844.

Finally, as the United States notes, the Sixth Circuit granted rehearing en banc and vacated its opinion in *United States* v. *Funk*, 534 F.3d 522 (CA6 2008), shortly after Mr. Wittig filed his petition for writ of certiorari. Br. Opp'n 11. The United States did not, however, note that, on March 11, 2009, it moved, unopposed, to dismiss its underlying appeal in *Funk* with prejudice. See Mot. to Dismiss Appeal, *United States* v. *Funk*, No. 05-3708 (CA6 Mar. 11, 2009). If granted, the United States's motion would negate the en banc vehicle for the Sixth Circuit to reconsider its "closer review" of variances in mine-run cases, leaving *Funk*'s reasoning untested. See *Scott* v. *Kelly*, 107 F.Supp.2d 706, 710, n.11 (ED Va. 2000) (treating as "persuasive" panel opinion vacated on granting of rehearing en banc but not decided because appellant withdrew appeal).

Divergent approaches persist in the courts of appeals not only regarding the proper scope of appellate review of variances in mine-run cases, but also regarding the second question presented in Mr. Wittig's petition: the permissibility of considering codefendant sentencing disparities under 18 U.S.C. §3553(a)(6). The United States claims that *Gall* resolved any conflicts on this issue but acknowledges that the Seventh Circuit has stated, post-*Gall*, that §3553(a)(6) applies only to nationwide sentencing disparities, not disparities between codefendants. Br. Opp'n 11-12 (quoting *United States* v. *Omole*, 523 F.3d 691, 700 (CA7 2008)). *Omole*'s holding was not confined by the particulars of the case, Br. Opp'n 12, but reflected that circuit's enduring statutory construction of §3553(a)(6). 523 F.3d, at 700 (citing, *e.g.*, *United States* v. *Davila-Rodriguez*, 468 F.3d 1012, 1014 (CA7 2006)). Similarly, the Eleventh Circuit's post-*Gall* holding in *Vidal* reaffirmed that court's long-standing interpretation of §3553(a)(6) as not encompassing sentencing disparities between codefendants. See *United States* v. *Vidal*, No. 07-14717, 2008 WL 1875965, at *4 (CA11 Apr. 29, 2008) (citing *United States* v. *Chotas*, 968 F.2d 1193, 1197-1198 (CA11 1992)).

The United States also fails to address, much less dispute, that, even within circuits that permit consideration of codefendant disparities, disagreements exist over the source of that authority. Some allow codefendant comparisons under §3553(a)(6) itself, see, *e.g.*, *United States* v. *Smart*, 518 F.3d 800, 804 (CA10 2008); others propose comparisons under §3553(a)(2)(A), see *Martin*, 520 F.3d, at 94; and still others look to §3553(a)(1). *United States* v. *Wills*, 476 F.3d 103, 110 (CA2 2007). Enduring disagreement over the proper construction of §3553(a)(6) is,

therefore, compounded by divergent approaches to codefendant disparities generally, inviting nationwide inconsistencies that warrant the Court's attention.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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